Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

ARCHIE GEE, DIRECTOR, et al.,
Petitioners,
v.
LISA JOYCE RUBIN,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a claim of ineffective assistance of counsel is based on a defense attorney's alleged conflict of interest because of personal and financial interests, and three attorneys other than the allegedly conflicted counsel represented the defendant at trial, what must a defendant show to establish a violation of the Sixth Amendment: that the "conflict of interest actually affected the adequacy of his representation," *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980), or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 694 (1984)?

2. Given this Court's decisions and the split of lower court authority on the issue whether a conflict of interest of one defense counsel taints otherwise independent trial counsel, did the Court of Appeals for the Fourth Circuit, in a habeas corpus case governed by 28 U.S.C. § 2254(d)(1), err in concluding that the Maryland state court's adjudication of the claim was an unreasonable application of clearly established precedent of this Court?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fourth Circuit.

Lisa Joyce Rubin was the appellee below. Archie Gee, Director of the Patuxent Institution, and J. Joseph Curran, Jr., Attorney General of the State of Maryland, were appellants below.

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Petitioners, Archie Gee, Director, and J. Joseph Curran, Jr., Attorney General, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 292 F.3d 396 (4th Cir. 2002) (App. 3a-32a). The opinion of the United States District Court for the District of Maryland is reported at 128 F. Supp. 2d 848 (D. Md. 2001) (App. 33a-79a). The opinion of the Court of Special Appeals of Maryland reversing the grant of state post conviction relief is unreported. (App. 81a-92a). The opinion and order of the Circuit Court for Montgomery County, Maryland, granting post conviction relief is unreported. (App. 93a-110a). The opinion of the Court of Appeals of Maryland affirming Rubin's convictions on direct appeal is reported at 325 Md. 552, 602 A.2d 677 (1992) (App. 111a-160a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on June 5, 2002. (App. 3a). A petition for rehearing and rehearing en banc was denied on July 23, 2002. (App. 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.

United States Code, Title 28, § 2254. State custody; remedies in Federal courts

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. The Trial

Respondent Lisa Joyce Rubin was convicted of first degree murder and use of a handgun in the commission of a felony after trial by a jury in Montgomery County, Maryland, in November 1990. (App. 93a). On January 31, 1991, Rubin was sentenced to serve a life sentence, with all but 30 years suspended, for murder, and a concurrent 20-year sentence on the handgun count. (App. 93a). Rubin's convictions were affirmed on appeal. *Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992). (App. 111a-160a).

The opinion of the Court of Appeals of Maryland on direct appeal thoroughly sets forth the facts of Rubin's trial, at which Rubin was represented by attorneys Barry Helfand, Fred Joseph, and Alan Goldstein. (App. 112a-121a). On April 24, 1990, Rubin shot and killed her estranged husband, Tim Warner, on a path in the woods behind the Peachtree Veterinary Clinic, where they had arranged to meet for the purpose of having their old, allergy-plagued dog, Mutley, euthanized. (App. 115a). As the Maryland court summarized the slaying:

> Rubin and Warner met at the Peachtree Clinic about 6:00 p.m. on April 24, after Warner had left Servin [his girlfriend] to wait for him at a shopping center. From all of the evidence, including particularly a trail of the victim's blood leading up to the body, two clusters of five, spent, .38-caliber cartridges next to the body, and the nature of the wounds, the jury could find the following. Rubin arrived in her Alfa Romeo sports coupe more than one hour in advance of the scheduled meeting time, for the purpose of reconnoitering the area. She carried a large nylon handbag which contained, in addition to ordinary personal items, the loaded revolver and ten extra rounds of .38-caliber ammunition, the loaded Beretta and, in a clear plastic baggie, seven additional rounds of .22-caliber ammunition, a tape recorder and two tapes. Warner, with Mutley, arrived in a Mustang borrowed from members of his family. Warner and Rubin walked down a path through the woods behind the clinic. Warner, who was right-handed, had Mutley on a leash that was wrapped around Warner's right wrist. The couple proceeded about 1,000 yards down the woodland path. Rubin, using the .38, began shooting at Warner, face on. Three shots struck him in the chest or arms or both, and one shot missed. Bleeding, he was able to move back down the trail for about 200 feet. At some point, aiming the .38 downward and at close range, Rubin shot Warner in the front of the skull. Warner fell, lying face down on the ground. Rubin ejected the five spent cartridges and reloaded. She fired five more rounds into Warner's upper left back as he lay prone. She ejected the five spent cartridges, reloaded the .38, and placed it back in the nylon handbag. She placed the Beretta under Warner's body.

> Although the Beretta's clip was full, there was no bullet in the firing chamber. In the course of these activities, whatever their sequence, Rubin dropped and left on the ground one of the .22-caliber bullets that had been in the baggie. She left Warner's body in the woods with Mutley still attached by the leash to Warner's right wrist.

(App. 116a-117a) (footnote omitted).

Visibly shaken, Rubin returned to the veterinary clinic and made a telephone call. (App. 118a). She told the clinic staff that she had called Warner, and that he would be delayed, whereas she actually called Robert Miller, a private investigator she had previously hired. (App. 118a). Miller and his associate, Robert Leopold, met Rubin, who led them to the crime scene in the woods. (App. 118a). The investigators took photographs of the corpse and put Mutley in a fenced area behind the clinic. (App. 119a).

Miller then called attorney Darrel Longest, who arrived at the scene with his partner, David Gavin, at about 9:00 p.m. (App. 119a). Longest had the investigators take Rubin to a hospital, in an effort to have her admitted for a possible drug overdose. (App. 119a). Rubin registered at the hospital under the name of Sharon Peterson, but was not admitted. (App. 119a). After being discharged at 3:00 a.m., she spent the rest of the night at the home of investigator Miller. (App. 119a).

The activities of attorneys Longest and Gavin, which ultimately led to a police search of their law office, was summarized by the Court of Appeals of Maryland:

> Meanwhile, Longest had notified the police who began processing the crime scene, illuminated by flood lights. During that processing a beeper which Warner had on his person was activated by a telephone call from Servin who was trying to find out what had delayed Warner. The police answered the page and learned from Servin that Warner had planned to meet Rubin at the veterinary clinic. A police check of

handgun records revealed that both the Beretta found under the body and a .38-caliber Smith & Wesson had recently been purchased by Rubin. The veterinarian placed Rubin at the clinic on the evening of the 24th. By early afternoon on the day following the murder the police, utilizing the information reviewed in this paragraph, obtained a warrant for Rubin's arrest. She surrendered herself on the evening of that day.

Also on the day following the murder Leopold, without Rubin's consent, contacted the police, was interviewed, and gave information which was incorporated into an application for a warrant that was issued to search the offices of Longest and Gavin. This application was admitted in evidence at the hearing on Rubin's motion to suppress. The application recites Leopold's activities and observations of the preceding evening, with the following additional particulars.

At the veterinary clinic Gavin asked Miller and Leopold if there were any guns and Leopold told him, "No." Longest told the investigators "'you are working as agents for Longest and Gavin,'" and not to tell anyone what had happened. Longest further instructed Miller and Leopold to take Rubin to the hospital, get her admitted, and to use an alias. The application further recites:

> "While Rubin was being treated Leopold looked through her purse, a tan colored Lesport bag. In the purse he observed a baggie with about 5 or 6 bullets in it and a minicassette recorder with 2 cassette tapes. Miller ended up taking possession of Rubin's purse and put it in the trunk of his vehicle. At around midnight, Miller left the hospital to meet with Longest and Gavin. The three then returned to the hospital at about 12:50 a.m. At around 2:00

> a.m. Longest instructed Leopold to leave the hospital, which he did, and went home."
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> * * *
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> The search of the Longest and Gavin offices on April 26 produced a number of items. In a locked, or lockable, file cabinet in the basement was the nylon bag; separate from the bag, in a manila envelope, was the .38-caliber revolver, fully loaded; and, in another manila envelope, separate from the bag, was the plastic baggie containing six .22-caliber bullets.

(App. 119a-121a) (footnote omitted).

B. The Appeal

On direct appeal, Rubin, through Alan M. Dershowitz and seven additional counsel on the brief, raised three principal points: (1) that the trial court violated Rubin's attorney-client or psychiatrist-patient privilege; (2) that the court improperly denied a requested jury instruction; and (3) that the prosecutor's closing argument denied her a fair trial. The Court of Appeals of Maryland affirmed Rubin's convictions in a reported opinion. (App. 111a-160a).

With respect to her series of arguments based upon privilege, the Court of Appeals first ruled that Rubin's attorney-client privilege with respect to the homicide did not arise until Gavin and Longest arrived at the crime scene. (App. 124a). Rejecting the State's argument that the crime-fraud exception to the privilege applied, the state court ruled that the testimony of investigator Leopold concerning his observation of the bullets in Rubin's purse violated the privilege. (App. 135a). The court, however, found the admission of this evidence harmless beyond a reasonable doubt given that "the evidence of guilt was overwhelming." (App. 135a). The court identified 15 reasons why Rubin's self-defense explanation was implausible in reaching its harmless error ruling. (App. 136a-137a).

C. State Post Conviction Proceedings

Through new counsel, Rubin filed a petition for post conviction relief in the Circuit Court for Montgomery County in 1995. (App. 82a, 93a). Over the course of the five-day hearing that took place on December 9 through 13, 1996, some 16 witnesses testified and numerous exhibits were admitted into evidence. (App. 93a).

According to Rubin, who pressed other claims as well, a conflict of interest existed between Rubin and attorneys Longest and Gavin, which resulted in a violation of the Sixth Amendment. (App. 94a). This conflict existed, Rubin argued, notwithstanding the fact that she was represented at trial by three other attorneys, Barry Helfand, Fred Joseph, and Alan Goldstein. (App. 97a). In particular, Rubin asserted that attorneys Darrel Longest and David Gavin had a conflict of interest because of their activities on the evening of April 24, 1990, when Rubin shot and killed her husband. (App. 97a-98a). Rubin theorized that, because Longest and Gavin were called to the scene of the shooting and took possession of Rubin's purse, bullets, and gun, they became fact witnesses and potentially criminally liable for their actions; thus, they could not thereafter represent her zealously. (App. 97a-99a). Rubin argued that because Gavin and Longest continued to participate in her defense through the time of her trial, but could not do so consistently with the duty of loyalty owed her, she was denied the right to conflict-free counsel. (*Id.*). The evidence adduced at the post conviction hearing showed the following with respect to these contentions.

David Gavin testified that he practiced law in a partnership with Darrel Longest from 1986 until 1992. J.A. 467.[1] He recounted that he and Longest responded to the crime scene on April 24, 1990, and spent time with Rubin on the following day. J.A. 468-69. Around May 1, 1990, attorney Barry Helfand was brought into the case. J.A. 474. This was done because of a possible conflict of interest and because Gavin and Longest might be witnesses regarding the issue of attorney-client privilege. J.A. 476, 520.

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[1] "J.A." references refer to the Joint Appendix filed in the Court of Appeals for the Fourth Circuit.

Gavin further testified that he had absolutely no knowledge of the trial that ultimately took place. J.A. 519. As Gavin put it, Barry Helfand, Fred Joseph, and Alan Goldstein "called the shots." J.A. 519. Gavin neither attended the trial nor was he privy to trial strategy and planning meetings. J.A. 520.

Darrel Longest testified at the post conviction hearing as well. J.A. 597-672. Longest, like Gavin, acknowledged bringing in Barry Helfand to represent Rubin to defend the murder case involving the death of her husband. J.A. 616. A fee of $250,000 was agreed upon as a fee for the case. J.A. 616-17. A meeting took place on May 1, 2000, attended by Rubin, Longest, Gavin, and Helfand, where it was agreed that Helfand would serve as trial counsel because of the potential conflict of interest and the fact that Longest and Gavin would possibly be witnesses in the case. J.A. 622-23.[2]

Like Gavin, Longest testified that he did not attend the trial. J.A. 657. Longest confirmed that Helfand, Goldstein, and Joseph acted independently of Longest and Gavin with regard to the defense of Rubin. J.A. 652. Specifically, Longest stated that he "never" exercised "any veto power over the tactical, legal, factual, or whatever kind of decision" the three attorneys made in the case. J.A. 652. Finally, Longest, like Gavin, testified that he did not participate in defense preparation conferences. J.A. 652.

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[2] Documents provided to the district judge by counsel showed that Longest and Gavin had entered their appearances in the District Court of Maryland on April 27, 1990, when Rubin was initially charged by way of an arrest warrant and statement of charges. J.A. 965. Rubin was indicted by a grand jury on May 25, 1990, and jurisdiction over the case was thereafter vested solely in the Circuit Court for Montgomery County. J.A. 966. Helfand entered his appearance in circuit court on May 30, 1990, and Goldstein and Joseph entered their appearances in that court on June 1, 1990. J.A. 7. The appearances of Longest and Gavin were never entered in circuit court.

Introduced as an exhibit at the hearing was a letter Longest and Gavin wrote on February 22, 1991, to the Attorney Grievance Commission of Maryland, in response to a complaint about the fee charged to Rubin. J.A. 483-84, 941. That 20-page letter detailed the work Gavin and Longest claimed to have done for Rubin throughout the course of her criminal defense. J.A. 941-60.

Two of the three attorneys who represented Rubin at her trial testified at the post conviction hearing.[3] Fred Joseph recounted that he came into the case after Helfand and Goldstein were already representing Rubin. J.A. 690. Joseph, like Gavin and Longest, testified that Helfand, Goldstein, and Joseph prepared Rubin's case and represented her at trial. J.A. 800. Joseph stated that he was not aware of Gavin's and Longest's involvement in the case, and that they "did not participate, as such, in the Court case." J.A. 800. Barry Helfand testified that he was brought into the case to represent Rubin because Gavin and Longest were potential fact witnesses. J.A. 872-73. Helfand specifically denied that Gavin or Longest dictated investigative or trial strategy. J.A. 905.

Both Joseph and Helfand testified as to their trial strategy and why they did not call Gavin, Longest, or their investigator, Miller, as witnesses. Both testified that in the investigation and preparation of the case for trial no efforts were made to protect Longest, Gavin, or Miller. J.A. 803, 912-13. Joseph testified at some length about the three attorneys' trial strategy. J.A. 731-70, 812-13.

Specifically, Joseph explained why, as part of the trial strategy, Longest, Gavin, and Miller were not called as witnesses. J.A. 812-13. Joseph stated that the defense team wanted to maintain the confidentiality of whatever Rubin told the three persons who responded to the crime scene and spent part of the next day with her. J.A. 812. Because of the potential that this legal issue would be waived if any of these witnesses testified, they were not called. J.A. 812.

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[3] The third, Alan Goldstein, died between the time of trial and the post conviction hearing. J.A. 800-01.

Two months after the hearing, the post conviction court issued an opinion and order granting Rubin relief. (App. 93a-110a). The court found that Gavin and Longest were members of the defense team along with Helfand, Goldstein, and Joseph. (App. 97a). The court further found that Gavin and Longest were potential fact witnesses because they responded to the crime scene, and that they faced the possibility of criminal charges for obstruction of justice due to their involvement with Rubin on April 24 and 25, 1990. (App. 100a). The post conviction court also concluded that the conflict prejudiced Rubin's defense because Gavin and Longest did not testify at her trial. (App. 100a-101a).

Granting the State of Maryland's application for leave to appeal, the Court of Special Appeals of Maryland reversed the post conviction court. (App. 81a-92a). The state appellate court ruled that Longest and Gavin did not control the decision whether to offer their testimony at trial, and that it was a reasonable strategic decision of Rubin's three trial counsel not to call Longest and Gavin as trial witnesses. (App. 88a). The state court found that although Gavin and Longest had "some association" with Rubin's case after her arrest, it consisted only of paralegal, investigative, and client relations work, having nothing to do with trial strategy. (App. 88a).

In relevant part, the Court of Special Appeals ruled as follows:

> In any case where an "ineffective assistance" claim is asserted against a lawyer who was not present with the defendant at trial, the party alleging ineffective assistance must establish that the lawyer in question had at least some responsibility for deciding upon the

> alleged deficiency, by advising, etc. the lawyer or lawyers who were in the courtroom. A counsel who "represents" an accused renders "ineffective assistance" only where he or she is in a position to take the action or inaction that constitutes the deficiency. We hold as a matter of law that, unless counsel could have prevented the happening of the deficient act, he or she cannot have rendered ineffective assistance.
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> * * *
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> Whether Longest and Gavin did or did not want to testify at trial, it is understandable why they were never called to the stand by the defense team. Longest and Gavin, however, had no say in deciding what witnesses were to be called, what evidence was to be presented, or what strategies were to be pursued. As neither Longest nor Gavin had the right to insist upon testifying, their failure or refusal to do so did not constitute ineffective assistance of counsel. We shall therefore grant the State's application and vacate the order granting Mrs. Rubin a new trial.

(App. 89a-90a, 91a) (footnote omitted).

D. Federal Habeas Corpus Proceedings

On March 2, 1999, Rubin filed a petition for habeas corpus relief, which was granted by the district court (Messitte, J.). *Rubin v. Gee*, 128 F. Supp. 2d 848 (D. Md. 2001). (App. 33a-79a). On appeal, the Fourth Circuit affirmed in a split decision. *Rubin v. Gee*, 292 F.3d 396 (4th Cir. 2002). (App. 3a-32a).

The majority concluded that *Cuyler v. Sullivan* rather than *Strickland v. Washington* applied to measure the alleged ineffective assistance of counsel claim based upon a conflict of interest. (App. 11a). The court further found that the state court's application of *Sullivan* was "objectively unreasonable" because Gavin's and Longest's conflict of interest adversely affected their performance. (App. 11a). The majority also determined that the taint "could not be cleansed simply by bringing in independent counsel to make trial decisions while Longest and Gavin continued to function as members of the defense team." (App. 17a).

While acknowledging a split of authority, the dissent agreed that under Fourth Circuit precedent *Sullivan* was the relevant standard to assess the conflict of interest issue in this case. (App. 21a). Judge Motz, however, disagreed with the conclusion that the state court unreasonably applied the *Sullivan* standard to the facts of Rubin's case. The dissent first took issue with the majority's determination that Gavin's and Longest's "*direct representation* of Rubin was adversely affected by their conflict of interest." (App. 22a). Given the state court's finding that Rubin's three independent trial lawyers made the decision not to call Gavin and Longest as witnesses, the dissent pointed out that "Rubin has not established and cannot establish" the link between Gavin's and Longest's "actual conflict" and the strategy undertaken by her trial counsel. (App. 27a). The dissent also disagreed with the majority's view that Longest's and Gavin's conflict "tainted" her three trial counsel. (App. 27a). Noting a disagreement among the federal courts of appeal on the taint issue, Judge Motz concluded that the state court's application of *Sullivan* could not be objectively unreasonable. (App. 28a).

REASONS FOR GRANTING THE WRIT

I. With This Case, The Court Can Address the Important Issue Left Open in *Mickens v. Taylor*, as to Which The Circuits Are in Conflict.

In *Mickens v. Taylor*, 122 S. Ct. 1237 (2002), the Court noted that while many lower courts have "unblinkingly" applied *Sullivan* to personal and financial conflict of interest claims, "the language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application." *Id.* at 1245. The Court concluded: "Whether *Sullivan* should be extended to such cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Id.* at 1246. This open question can, and should, be resolved here.

In the Fourth Circuit, the State of Maryland argued that *Strickland*'s general standard of assessing Sixth Amendment claims rather than *Sullivan*'s test should be applied to Rubin's case. Acknowledging that this Court in *Mickens* "expressed doubt about whether *Sullivan* applies," the court below nonetheless applied Fourth Circuit precedent and utilized the *Sullivan* framework. (App. 11a). Given the substantial split among the lower courts on the issue, and the fact that the issue has been recognized as an important one by members of this Court as long ago as 1984, now is the time to reckon with it.

A conflict in the cases almost two decades ago was noted in a dissent to a denial of a petition for a writ of certiorari filed by Justice White, and joined by Chief Justice Burger and then Justice Rehnquist. *Illinois v. Washington*, 469 U.S. 1022 (1984). In that pre-*Strickland* case, the Supreme Court of Illinois had held that the *Sullivan* conflict of interest standard was limited to multiple-representation cases. *People v. Washington*, 461 N.E.2d 393, 397 (Ill.), *cert. denied*, 469 U.S. 1022 (1984). In his dissent, Justice White catalogued the numerous decisions that "failed to discern in *Cuyler* [*v. Sullivan*] any limitation to cases involving multiple representation of defendants." 469 U.S. at 1023.

In the years following the Illinois court's *Washington* case and this Court's decision in *Strickland*, most courts have ruled that *Sullivan*'s standard applies to conflict of interest cases in a variety of contexts beyond multiple-representation situations. In *Strickland* itself, the Court discussed *Sullivan* and conflict of interest claims generally, without limitation to any particular type of conflict, and noted the presumption of prejudice aspect of such claims that was different from other

Sixth Amendment claims where the defendant must "affirmatively prove prejudice." 466 U.S. at 692-93.

As the Fourth Circuit explained here, it had earlier ruled that *Sullivan* applied in a case involving a personal conflict of interest claim rather than one of multiple or successive representation. *See United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir. 1991). Other circuit courts of appeal have likewise applied *Sullivan* rather than *Strickland* to cases of personal or financial conflict allegations. *See, e.g., Atley v. Ault*, 191 F.3d 865, 870 (8th Cir. 1999) (defense counsel's pending appointment to county attorney's office); *Spreitzer v. Peters*, 114 F.3d 1435, 1451 n.7 (7th Cir. 1997) (noting that Seventh Circuit has "routinely applied both the *Cuyler* and the *Holloway* standards to conflict of interest cases which are not multiple representation cases"); *United States v. Sayan*, 968 F.2d 55, 64-65 (D.C. Cir. 1992) (allegation that attorney failed to request continuance because he was afraid judge would take action against him or his firm); *Buenoano v. Singletary*, 963 F.2d 1433, 1438 (11th Cir. 1992) (book and movie contract of attorney); *United States v. Michaud*, 925 F.2d 37, 40 (1st Cir. 1991) (attorney's association with IRS); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) (attorney's book contract), *cert. denied*, 451 U.S. 938 (1981).

Notwithstanding this authority, the Fifth Circuit's en banc decision in *Beets v. Scott*, 65 F.3d 1258, 1272-77 (5th Cir. 1995) (en banc), *cert. denied*, 517 U.S. 1157 (1996), applied *Strickland* rather than *Sullivan* in a conflict case where defense counsel entered into a literary and media rights fee arrangement during the pendency of representation. In so holding, the Fifth Circuit pointed out: "The Supreme Court has not expanded *Cuyler*'s presumed prejudice standard beyond cases involving multiple representation." *Id.* at 1265. Following the lead of the Fifth Circuit's decision, the Second and Sixth Circuits have since held that *Sullivan* should be confined to multiple representation cases. *See United States v. O'Neil*, 118 F.3d 65, 72 (2nd Cir. 1997) ("To the extent that the attorney shirks his ethical obligation to dutifully represent his client as a result of a fee dispute, we believe *Strickland* provides the appropriate analytic framework."), *cert. denied*, 522 U.S. 1064 (1998); *United States v. Mays*, 77 F.3d 906, 908-09 (6th Cir. 1996) (citing *Beets* and applying *Strickland* to claim that attorney's past interaction with federal law enforcement officials created conflict of interest). The Eighth and Ninth Circuits, without overruling their prior precedent, have questioned whether *Sullivan* should be applied beyond its original context. *See Caban v. United States*, 281 F.3d 778, 782 (8th Cir. 2002) ("We believe there is much to be said in favor of holding that *Cuyler*'s rationale favoring the 'almost per se rule of prejudice' does not apply outside the context of a conflict between codefendants or serial defendants."); *Garcia v. Bunnell*, 33 F.3d 1193, 1198 n.4 (9th Cir. 1994) (suggesting that *Sullivan* approach does not necessarily "apply to conflicts between a defendant's and the attorney's own personal interests"), *cert. denied*, 514 U.S. 1024 (1995).

The issue of which Sixth Amendment standard to apply in cases such as the present one has divided the lower courts as described above and as recognized by the Court in *Mickens*. And, although the *Sullivan* rule of presumed prejudice makes perfect sense in the context of loyalties divided between codefendants, applying the rule inflexibly to a "spectrum of potential ethical problems is a draconian remedy." *Beets*, 65 F.3d at 1271. Stated otherwise, conflicts range from benign to devastating, and as a factual matter, not every one will result in a complete miscarriage of justice.

The facts here illustrate why *Strickland* rather than *Sullivan* should apply. To be sure, Rubin was represented at the time of her arrest by Longest and Gavin, who had a potential personal conflict with their client's interests. Within days, however, three non-conflicted, independent attorneys were brought into the case precisely because of this problem. Although there is a high likelihood of prejudice in the *Sullivan* multiple representation situation, such is not the case when a single client is represented by multiple attorneys, one with a potential conflict and one without the conflict. There, the strong presumption of prejudice evaporates. For that reason, *Strickland* standards should apply. This is particularly true given the myriad factual circumstances in such situations, where the nature and extent of each attorney's participation can range from one extreme to the other. Where, as here, the non-conflicted attorneys appeared at trial and completely dictated trial strategy, and the potentially conflicted attorneys did not appear at trial and had nothing to do with trial strategy, there can be no Sixth Amendment violation. Thus, in cases beyond multiple or serial representation, only the *Strickland* rule, which requires a showing of actual prejudice, is efficacious.

II. Given the Absence of Controlling Authority From This Court, as Evidenced by the Conflict Among the Lower Courts on When One Attorney's Conflict "Taints" Independent Trial Counsel, the Fourth Circuit's Decision Conflicts With *Williams v. Taylor* and *Bell v. Cone*.

Whether as a consequence of the *Sullivan* versus *Strickland* issue described above, or simply because this Court has never had occasion to address a conflict of interest claim in a factual context similar to the present one, another conflict exists among the lower federal courts regarding whether and when independent trial counsel are tainted by the alleged conflicts of interest of other counsel involved in the case. On similar facts, some courts find a taint and others do not. Given this conflict among this circuits, it can hardly be said that either view is an "objectively unreasonable" application of clearly established precedent of this Court, under the deferential standard of review for federal habeas cases under Section 2254. Consequently, the decision below conflicts with this Court's recent pronouncements in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Bell v. Cone*, 122 S. Ct. 1843 (2002).

Under current law, a writ of habeas corpus may issue only if a petitioner can show that the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1). Under *Williams* and *Cone*, a federal "court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case." *Cone*, 122 S. Ct. at 1850 (citing *Williams*, 529 U.S. at 407-08). The focus of this inquiry looks to whether the state court's application is "objectively unreasonable," which is not the same as whether the application is an incorrect one. *Id.*

Here, the state court found that although Longest and Gavin may have had a conflict of interest, they were not responsible for carrying out Rubin's trial strategy. (App. 88a). They did not attend Rubin's trial, but rather Rubin hired "three outstanding attorneys" to represent her at trial. (App. 88a). Thus, even though Gavin and Longest may have assisted "behind the scenes," they had nothing to do with trial strategy. (App. 88a).

Given these fact findings, the state court held as a legal matter "that, unless counsel could have prevented the happening of the deficient act, he or she cannot have rendered ineffective assistance." (App. 90a). As the state court concluded: "As neither Longest nor Gavin had the right to insist upon testifying, their failure or refusal to do so did not constitute ineffective assistance of counsel." (App. 91a).

Because the state court refers to both *Strickland* and *Sullivan*, it is not entirely clear which of the two standards it applied. (App. 86a-87a). Even so, neither *Strickland* nor *Sullivan* nor any other decisions of this Court deal with this taint situation in the context of a Sixth Amendment claim.

That lower courts disagree that a Sixth Amendment violation has occurred in similar factual contexts underscores that the Maryland state court's ruling as a matter of law was not objectively unreasonable. In *Triana v. United States*, 205 F.3d 36 (2nd Cir.), *cert. denied*, 531 U.S. 956 (2000), the defendant was represented by two lawyers, Luis Beltre and Jerald Levine. The court found that one attorney, Beltre, had an actual conflict of interest because he was a participant in the same cocaine scheme from which Triana's charges arose. *Id.* at 38. Finding that the other attorney, Levine, did not have a conflict of interest, the court denied Triana's petition for collateral relief. As the Second Circuit stated: "In short, Levine labored under no conflict, and Beltre had a conflict but labored not." *Id.*

The Seventh Circuit has also ruled that alleged deficiencies in one attorney's performance did not constitute a Sixth Amendment violation "where a defendant is adequately represented by several lawyers and the defendant's overall representation is not impaired by any actual conflict." *Stoia v. United States*, 109 F.3d 392, 398 (7th Cir. 1997). As that court concluded: "To hold otherwise would allow defendants represented by multiple lawyers to take two bites at the apple simply by showing that one of the lawyers was somehow conflicted in his representation." *Id.* at 399. *See also Bucuvalas v. United States,* 98 F.3d 652, 656-57 (1st Cir. 1996) (no conflict of interest where attorney's fee was paid by co-defendant because no showing that attorney's professional judgment was tainted). Other lower courts have held that hypothetical conflicts having no effect on trial counsel's representation are insufficient to make out a Sixth Amendment violation. *See, e.g., United States v. Taylor*, 139 F.3d 924, 931 (D.C. Cir. 1998); *Cerro v. United States*, 872 F.2d 780, 785-86 (7th Cir. 1989); *United States v. Gambino*, 864 F.2d 1064, 1070 (3rd Cir. 1988), *cert. denied*, 492 U.S. 906 (1989).[4]

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[4] Justice Kennedy, joined by Justice O'Connor, spoke to this point in a concurring opinion in *Mickens*. Rejecting the approach taken by the majority here, Justice Kennedy cautioned against hypothetical conflicts,

(continued...)

In direct opposition to these cases, the Fourth Circuit looked to its own precedent, where one attorney's conflict of interest was held to taint an independent trial counsel. In *United States v. Tatum*, 943 F.2d 370, 379 (4th Cir. 1991), the court ruled that where one attorney with a conflict sat at trial table and actively assisted the counsel of record, the latter was tainted. Relying on this case, the majority below found the state court ruling to the contrary to be "objectively unreasonable." (App. 11a).

This ruling is flawed for several reasons. Although the majority claims that it did not call into question the state court's factual finding that Rubin's trial lawyers independently made the decision not to call Longest and Gavin as witnesses, (App. 17a), it also concludes Longest's and Gavin's direct representation of Rubin was adversely affected by their conflict of interest because they did not testify on her behalf, (App. 16a). This internally inconsistent reasoning does not establish that the state court's ruling was objectively unreasonable. Rather it merely shows that the federal court effectively ignored the dictates of the AEDPA, which forbids the granting of a writ of habeas corpus unless a state court ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(2). Given the state court's finding that Rubin's three trial attorneys, and not Gavin and Longest, made the tactical decisions, (App. 88a), the majority's reasoning rests on a false premise and must fail.

Moreover, as the dissent points out, the *Tatum* decision does not establish that the state court's application of clearly established law in rejecting the taint argument was objectively unreasonable. As Judge Motz remarked:

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[4](...continued)
stating that reviewing courts are "not to speculate about counsel's motives or about the plausibility of alternative litigation strategies." 122 S. Ct. at 1246.

> Although I certainly prefer our approach, in light of the Supreme Court's silence on the point, it is impossible to conclude that it was "clearly established," as a matter of *Supreme Court* law, that our rule must be followed. Indeed, the circuit split exhibited by *Triana* and *Tatum* testifies to the absence of any Supreme Court case that resolves the question.

(App. 28a-29a) (citations omitted).[5]

In sum, it appears that the majority below exercised its own independent judgment on the facts and the law in determining that the state court's ruling was incorrect. Under Section 2254, as interpreted by this Court in *Williams* and *Cone,* a writ of habeas corpus may not be issued based upon such reasoning.

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[5] Additionally, the split exhibited in *Triana* and *Tatum* involves whether a conflicted lawyer who appears at trial can taint other unconflicted lawyers. This Court has not resolved this issue, much less the question whether "a non-participating lawyer's conflict could so infect otherwise unconflicted lawyers' representation as to render the latter's representation constitutionally ineffective." (App. 32a).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Solicitor General

Counsel for Petitioners

**Counsel of Record*

October 18, 2002

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 23, 2002

No. 01-6411
CA-99-621-PJM

LISA JOYCE RUBIN

Petitioner - Appellee

v.

ARCHIE GEE, Director; J. JOSEPH CURRAN, JR.

Respondents - Appellants

- - - - - - - - - - - - - -

On Petition for Rehearing and Rehearing In Banc

- - - - - - - - - - - - - -

The appellants have filed a petition for rehearing and rehearing en banc.

Judge Motz voted to grant panel rehearing. Chief Judge Wilkinson and Judge Howard voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Chief Judge Wilkinson for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX B

United States Court of Appeals,
Fourth Circuit.

Lisa Joyce RUBIN, Petitioner-Appellee,
v.
Archie GEE, Director; J. Joseph Curran, Jr.,
Respondents-Appellants.

No. 01-6411.

Argued Oct. 30, 2001.
Decided June 5, 2002.

Affirmed by published opinion. Chief Judge WILKINSON wrote the opinion, in which Judge HOWARD joined. Judge DIANA GRIBBON MOTZ wrote a dissenting opinion.

WILKINSON, Chief Judge.

Lisa Joyce Rubin, a Maryland prisoner, claims she was denied the effective assistance of counsel and seeks federal habeas corpus relief. The district court granted a writ of habeas corpus, concluding that the state court's decision not to grant Rubin a new trial was an objectively unreasonable application of clearly established federal law regarding Rubin's right to conflict-free representation. *See Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Because two of Rubin's attorneys labored under a conflict of interest that adversely affected Rubin's representation, and because Rubin was denied the assistance of counsel by these lawyers' corruption of the attorney-client relationship from the night of Rubin's crime until the conclusion of Rubin's trial, we affirm the judgment of the district court.

The case involved two attorneys who in the aftermath of a crime schooled their client in the tactics of evasion in order to guarantee their own fee. Then to avoid criminal indictment and keep their conduct from coming to light, the attorneys took cover as part of the defense team. While the prosecution harped at trial on Rubin's actions immediately following the crime, the attorneys could not be called as fact witnesses and their role in directing Rubin's actions was never explained. To say this had an adverse impact on her trial is self-evident. To say the actions here tarnished the noble calling of criminal defense work is an understatement.

I.

On November 11, 1990, Lisa Joyce Rubin was convicted of first degree murder and the use of a handgun in a crime of violence. She was sentenced to life in prison, with all but 30 years suspended, on the murder charge and a concurrent sentence of 20 years on the handgun charge. There is no question that Rubin shot and killed her husband, Timothy Warner. However, Rubin, the only defense witness called at trial, claimed she was acting in self-defense.

A series of events ultimately led to the homicide. During her marriage to Warner, Rubin had an affair with William Glisson. Rubin and Warner ended up bringing a civil suit against Glisson because Glisson assaulted Rubin during the affair. In the course of the civil trial, Glisson was poisoned when he drank out of a soda bottle containing cyanide.

After the civil proceeding against Glisson, Rubin and Warner separated. Rubin subsequently hired private investigators, Robert Miller and Robert Leopold, to determine whether Warner was having an affair. In April 1990, Rubin told Miller that Warner confessed to her that he had poisoned Glisson. Rubin claimed she was afraid of Warner and wanted to tell the police what she knew about the attempt on Glisson's life. Miller referred Rubin to Darrel Longest, an attorney, so that Longest could arrange for Rubin to meet with the police.

On April 20, 1990, after Longest secured immunity for Rubin, Rubin and Longest met with a police officer to tell him about Warner's confession.

Four days later, on April 24, 1990, Rubin met Warner at a veterinary clinic to have their dog put to sleep. During a walk with Warner in the woods behind the clinic, Rubin told Warner that she had gone to the authorities about his confession. According to Rubin, Warner was enraged and pulled out what she believed to be a gun. Rubin then took a handgun out of her purse and shot Warner eight times.

After the shooting, Rubin proceeded back into the veterinary clinic and called Miller in an attempt to reach her attorney, Longest. Following Miller's instructions, Rubin met him and the other private investigator, Leopold, at a neutral location. The three of them then returned to the scene of the crime. Miller called Longest and his law partner, David Gavin, who both came to the crime scene. At that time, it became clear that Rubin had taken a lot of medication. So Longest told Miller and Leopold to take her to the hospital for a possible drug overdose. However, Longest went one step further. In an apparent effort to have Rubin evade detection, Longest instructed Miller and Leopold to have Rubin admitted to the hospital under a false name. The attorney's instructions were meticulously executed.

While Rubin was in the hospital, Longest notified the police that Warner was dead. However, he never disclosed Rubin's identity or whereabouts. With Rubin still at large, Longest and Gavin were able to direct her actions in order to ensure themselves ample compensation. The day after the shooting, attorney Gavin drove Rubin to the bank so she could withdraw the sum of $105,000 to cover Longest and Gavin's retainer fee and expenses. Meanwhile, attorney Longest took possession of the evidence in the case. Longest took Rubin's jacket, her purse, some .22 caliber bullets, and a .38 caliber handgun and kept them at his law offices. Finally--only after the attorneys discovered that a warrant was out for Rubin's arrest--Longest and Gavin turned Rubin in to the police at 7:00 p.m. on April 25th.

Longest and Gavin continued to advise Rubin after the homicide. They recommended to Rubin who should serve as her trial counsel. They persuaded her to hire Barry Helfand, who in turn brought in Alan Goldstein and Fred Joseph. And remarkably, considering the post-shooting events, Longest and Gavin remained part of the defense team even after Helfand, Goldstein, and Joseph were brought into the case. Longest and Gavin continued to collect a fee from Rubin, even though they did not sit at counsel table during her trial.

Except for the fact that Rubin went to the hospital, none of the facts regarding the events following the homicide were brought out during Rubin's direct examination. And Longest and Gavin were not called to testify about their roles in directing Rubin's actions in the immediate aftermath of the shooting. However, the State brought out the events from the twenty-four hours following the homicide during Rubin's cross-examination, without any mention of Longest and Gavin's activities. The State used the facts to refute Rubin's self-defense claim by arguing that she had fled the scene of the crime, lied about her identity, and showed consciousness of guilt.

Following her conviction, the Maryland Court of Appeals granted certiorari and affirmed Rubin's conviction. *See Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992). On September 29, 1995, Rubin filed a petition for post-conviction relief in the Circuit Court for Montgomery County. Following an evidentiary hearing, the post-conviction court granted Rubin's petition for a new trial, finding a conflict of interest between Rubin and defense attorneys Longest and Gavin that violated Rubin's Sixth Amendment right to counsel.

On appeal by the State of Maryland, the Court of Special Appeals reversed in an unreported decision. The Court of Special Appeals did not dispute the post-conviction court's factual findings regarding Longest and Gavin's actions after the homicide. And the court found that Longest and Gavin "served as counsel on behalf of Mrs. Rubin" up to and throughout her trial. However, the state court found that after the events following the homicide, Longest and Gavin's contribution to the defense team "consisted of what is most accurately described as 'paralegal/investigative' work ... and 'client relations' that had nothing to do with trial strategy." Therefore, the Court of Special Appeals held that because Longest and Gavin did not control the decision of whether to offer their testimony at trial, and because it was a reasonable decision by Rubin's trial counsel not to call them, Longest and Gavin's "failure or refusal" to testify did not constitute ineffective assistance of counsel. The Maryland Court of Appeals denied Rubin's application for certiorari. *See Rubin v. State*, 351 Md. 663, 719 A.2d 1262 (1998).

Having exhausted her state remedies, Rubin filed a petition for habeas corpus relief in the district court. On February 7, 2001, the district court granted Rubin's petition, finding that the Maryland Court of Special Appeals unreasonably applied the clearly established Supreme Court precedent of *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The district court held that it was objectively unreasonable for the state court to conclude that Rubin was not denied the effective assistance of counsel by Longest and Gavin's conflict of interest during the pretrial and trial phases of Rubin's case. *See Rubin v. Gee*, 128 F.Supp.2d 848, 865-69 (D.Md.2001). The court stressed that it was unreasonable for the state court to conclude that "counsel as deeply conflicted as Longest and Gavin were could remain active in [her] case." *Rubin*, 128 F.Supp.2d at 869.

Alternatively, the district court concluded that the state court's finding that Longest and Gavin played only a "paralegal/investigative role" on Rubin's defense team was an unreasonable determination of the facts in light of the evidence presented in the state court, constituting another basis for granting Rubin habeas relief. The court noted that the evidence included a detailed letter from Longest and Gavin to the Maryland Attorney Grievance Commission explaining that "Longest and Gavin served Rubin in a 'multitude of ways ... even during the trial.'" *Id.* at 856-58, 869-70. The district court concluded that the state court's "minimization of counsel's role was clearly and convincingly unreasonable in light of this evidence." *Id.* at 870. Maryland now appeals.

II.

A.

Rubin filed her petition for a writ of habeas corpus after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), so we apply 28 U.S.C. § 2254 as amended by the AEDPA. Rubin's claims were adjudicated on the merits in state court. Therefore, in order for federal habeas relief to be granted, the state court's decision must be "contrary to, or involve[] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).[1]

The Supreme Court addressed the meaning of § 2254(d)(1) in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The Court explained several ways in which a state court decision can be "contrary to" or an "un-reasonable application of" clearly established federal law. *See Williams*, 529 U.S. at 405-07, 120 S.Ct. 1495. Only one of the Court's explanations is relevant in this case: A state court decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal rule from [the] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407, 120 S.Ct. 1495. "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409, 120 S.Ct. 1495.

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[1] Pursuant to § 2254, a writ of habeas corpus may also be granted if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). The district court relied on this provision as an alternative basis for granting habeas relief to Rubin. *See Rubin*, 128 F.Supp.2d at 869-70. Because we conclude that the state court's decision was an unreasonable application of federal law under § 2254(d)(1), this ends our inquiry. There is no need to call the state court's factual findings into question.

The Court has stressed that "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410, 120 S.Ct. 1495. A federal court may not grant habeas relief "simply because [the] court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411, 120 S.Ct. 1495; *see also Bell v. Jarvis*, 236 F.3d 149, 160- 63 (4th Cir.2000) (en banc). We must determine here whether the state court's legal conclusion that Rubin received effective assistance of counsel was an objectively unreasonable application of clearly established federal law to the facts of Rubin's case. *See Sullivan*, 446 U.S. at 341-42, 100 S.Ct. 1708 (conflict of interest determination is a mixed question of law and fact, requiring the "application of legal principles to the historical facts").

B.

It is clearly established federal law that the Sixth Amendment "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal quotations omitted). Further, it is clearly established that the right to effective assistance includes the right to representation free from conflicts of interest. *Sullivan*, 446 U.S. at 348- 50, 100 S.Ct. 1708; *see also Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); *Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Glasser v. United States*, 315 U.S. 60, 70, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942). Lawyers owe their clients a duty of loyalty, including the duty to avoid conflicts of interest. And the Supreme Court has emphasized that the duty of loyalty is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052.

In order to establish ineffective assistance of counsel in a conflict of interest situation, a defendant who did not raise an objection at trial "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348, 100 S.Ct. 1708. Adverse effect cannot be presumed from the mere existence of a conflict of interest. *See Mickens v. Taylor*, 122 S.Ct. 1237, 1243-45, 152 L.Ed.2d 291 (2002). The Supreme Court has explained that *Sullivan* does not require "inquiry into actual conflict as something separate and apart from adverse effect." *Id.* at 1244 n. 5. Rather, "[a]n 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.*

However, if a defendant shows that a conflict of interest existed and that it adversely affected counsel's performance, prejudice will be presumed and the defendant need not demonstrate a reasonable probability that, but for the attorney's conflict of interest, the trial's outcome would have been different. *Sullivan*, 446 U.S. at 349-50, 100 S.Ct. 1708; *see also Mickens*, 122 S.Ct. at 1244-45; *Glasser*, 315 U.S. at 76, 62 S.Ct. 457. This presumption of prejudice arises because "it is difficult to measure the precise effect on the defense" when representation is "corrupted by conflicting interests." *Strickland*, 466 U.S. at 692, 104 S.Ct. 2052; *see also Holloway*, 435 U.S. at 490-91, 98 S.Ct. 1173. When lawyers' conflicts of interest adversely affect their performance, it calls into question the reliability of the proceeding and represents a breakdown in the adversarial process fundamental to our system of justice.

III.

In Rubin's case, the Maryland Court of Special Appeals identified *Cuyler v. Sullivan* as the clearly established federal law governing Rubin's claim of ineffective assistance of counsel due to a conflict of interest. The state court also recognized that a conflict of interest can exist between a client and her attorneys' own personal interests and that both pretrial and trial representation can be ineffective. *See, e.g., United States v. Magini*, 973 F.2d 261, 263-64 (4th Cir.1992); *United States v. Tatum*, 943 F.2d 370, 376 (4th Cir.1991).[2] However, the court did not conclude that Longest and Gavin's actions following the homicide created an actual conflict of interest that deprived Rubin of effective assistance. And the court did not consider the continuing effects of Longest and Gavin's conflict when evaluating the effectiveness of Rubin's trial representation.

This was an "objectively unreasonable" application of clearly established federal law because Longest and Gavin plainly had a conflict of interest that adversely affected their own performance and the performance of Rubin's trial counsel. Therefore, under *Sullivan*, Rubin was denied the effective assistance of counsel by Longest and Gavin's actual conflict of interest. Indeed, statutory terms of art fail to fully capture the appalling nature of the attorneys' misconduct here and the effect it had on Rubin's subsequent trial. What transpired requires us to take the rare and extraordinary step of granting Rubin the writ of habeas corpus under the rigorous standards of § 2254.

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[2] While the Supreme Court has expressed doubt about whether *Sullivan* applies to every potential conflict of interest, *see Mickens*, 122 S.Ct. at 1245-46, the Court has never indicated that *Sullivan* would not apply to a conflict as severe as the one presented here. Therefore, we conclude that the state court correctly utilized the *Sullivan* framework when analyzing Rubin's ineffective assistance of counsel claim.

A.

Longest and Gavin's personal interests fundamentally conflicted with the objectives of Rubin's representation from the moment they arrived at the scene of the crime until the completion of her trial. The state post-conviction court made numerous factual findings regarding Longest and Gavin's actions on the night of the homicide that gave rise to their conflict of interest. And, as the district court correctly emphasized, the Court of Special Appeals "left wholly intact" these findings of the post-conviction court. *Rubin*, 128 F.Supp.2d at 865. In fact, the state court did not focus on or dispute the fact that Longest and Gavin had a conflict of interest. And nothing in the record suggests that Rubin waived or even understood the conflict of interest that Longest and Gavin's representation had created. *See Rubin*, 128 F.Supp.2d at 866-67.

The Court of Special Appeals found that after arriving at the scene of the crime, "Longest told Miller and Leopold to take [Rubin] to a hospital for a possible drug overdose and have her admitted under a false name." The private investigators carefully followed Longest's instructions. Rubin left the crime scene and Miller and Leopold registered her under the alias of "Sharon Peterson" at the hospital. Then, "Longest notified the police that Warner was dead, but did not disclose [Rubin's] identity" and did not even notify the police that he and Gavin represented Rubin.

In addition, Longest and Gavin removed evidence from the crime scene. The state court found that "Longest took possession" of Rubin's property, including her "jacket, a purse, .22 caliber bullets and a .38 caliber Smith and Wesson handgun." Longest and Gavin kept these items at their own law offices. On the day following the homicide, Longest and Gavin failed to present Rubin to the police. Instead, concerned solely with their own financial gain, "Gavin drove [Rubin] to her bank to withdraw $105,000 to be used as [Longest and

Gavin's] retainer fee and to cover [their] expenses." Finally, only after they discovered that a warrant was out for Rubin's arrest, Longest and Gavin turned Rubin in to the police almost twenty-four hours after they had arrived on the scene of the crime.

It can hardly be disputed that Longest and Gavin's conduct created a conflict of interest. Rubin's lawyers utterly failed to function as Rubin's advocates. Instead, they schooled Rubin, Miller, and Leopold in evasive action and functioned almost as accessories after the fact. The lawyers' desire to secure a $105,000 retainer fee "caused them to counsel Rubin to act in an unnecessarily suspicious fashion when they caused her to delay her surrender to the police for 24 hours." *Rubin*, 128 F.Supp.2d at 865-66. Her attorneys' pretrial conduct created serious problems for Rubin at trial. Rubin's lawyers had instructed her to take the precise actions that were subsequently used by the prosecution at trial to establish her premeditation and consciousness of guilt. For example, the prosecutor seized on Rubin's conduct during closing argument, saying, *inter alia*: "Does she flee from this scene? You bet. Does she lie? You bet." *Rubin*, 128 F.Supp.2d at 852.

Rubin thus had a strong interest in having Longest and Gavin help the jury understand that she acted on the advice of her own lawyers following the homicide. The very attorneys who were supposed to function in a representative capacity had become critical fact witnesses regarding the crime scene and Rubin's conduct. Testimony from either of the attorneys at trial might have helped explain Rubin's behavior to the jury.

Testimony, however, was apparently the last thing Longest and Gavin had in mind. They had a powerful conflicting interest in shielding themselves from testifying to conceal their role in the events following the homicide. Longest and Gavin did not--indeed could not--fulfill their obligations to vigorously protect their client's interests.

The state post-conviction court made undisputed findings that Longest and Gavin's actions had exposed them to potential criminal charges for obstruction of justice and hindering the apprehension of a criminal defendant. In fact, Longest and Gavin were the subject of a grand jury investigation that began before Rubin's trial and continued until after it was complete. Longest even had to engage his own attorney to represent him in this investigation. *See Rubin*, 128 F.Supp.2d at 859-61, 865 (recounting Longest's post-conviction testimony and his attorney's testimony regarding the criminal investigation of Longest and Gavin). Furthermore, Longest and Gavin were also the targets of an inquiry by the Maryland Attorney Grievance Commission during which they had to justify the $150,000 fee they eventually collected for representing Rubin. *See id.* at 856-58 (recounting details from the post-conviction hearing involving Longest and Gavin's letter to the grievance commission justifying their fee). The Court of Special Appeals did not dispute these facts. And, in its reply brief, the State acknowledged the investigations of Longest and Gavin and conceded that Longest and Gavin's activities on the night of the homicide and the next day "were fraught with both ethical and criminal overtones." At all times, the attorneys' fidelity to their own interests superseded any sense of obligation they may have had to their client.

B.

Instead of disputing that Longest and Gavin had a conflict of interest, the Court of Special Appeals concluded that any conflict Longest and Gavin had did not adversely affect Rubin's representation because Longest and Gavin advised Rubin to retain three independent attorneys to represent her at trial. In order to show an adverse effect from an attorney's conflict of interest, the defendant must establish by a preponderance of the evidence that a plausible alternative defense strategy existed "that [her] defense counsel might have pursued," that this "alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision," and that "the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir.2001) (en banc), *aff'd*, ___ U.S. ___, 122 S.Ct. 1237, 152 L.Ed.2d 291, 2002 WL 459251.

In its decision, the state court found that Longest and Gavin did not control Rubin's trial strategy and held "as a matter of law that, unless counsel could have prevented the happening of the [allegedly] deficient act, he or she cannot have rendered ineffective assistance." The court concluded that because Longest and Gavin did not have the right to insist on testifying, "their failure or refusal to do so did not constitute ineffective assistance of counsel." This was an objectively unreasonable application of *Sullivan* because Longest and Gavin's conflict of interest adversely affected Rubin's representation in at least two ways.

1.

First, Longest and Gavin's direct representation of Rubin was adversely affected by their conflict of interest. While the state court found that Longest and Gavin "were not responsible for deciding upon or for carrying out Mrs. Rubin's trial strategy," it also found that Longest and Gavin continued to serve "as counsel on behalf of Mrs. Rubin" from the night of the homicide until the end of her trial. They participated on her defense team. In the letter they sent to the Maryland Attorney Grievance Commission, Longest and Gavin indicated that they spent "by far" the most time with Rubin in the events leading up to her trial. *Rubin*, 128 F.Supp.2d at 856. And at the end of the day, Longest and Gavin collected $150,000 for their representation of Rubin while Helfand, Goldstein, and Joseph collected only $100,000. *Id.* at 866.

Longest and Gavin's continued participation on Rubin's case, even after Helfand, Goldstein, and Joseph were brought in to serve as trial counsel, allowed them to wrap themselves in the attorney-client privilege and assure that they would not be asked to testify at trial. The defense team called Rubin to the stand as their sole witness, but never mentioned the role her attorneys played in directing her behavior following the homicide. This "virtually sealed off access to any testimony from [Longest and Gavin]" regarding their role. *Rubin*, 128 F.Supp.2d at 866. It allowed the prosecution to cross-examine Rubin about her conduct. And the State used those facts to establish Rubin's premeditation and her consciousness of guilt.

The only issues at Rubin's trial were premeditation and deliberation, not whether Rubin committed the homicide. The actions Longest and Gavin instructed Rubin to take made the shooting "look more pre-meditated and more deliberate." *Rubin*, 128 F.Supp.2d at 869. Yet Longest and Gavin never considered "remov[ing] themselves from the case altogether so that they might become witnesses on her behalf. They never thought to draw the State's attention to their own actions regarding the handling of evidence at the crime scene or in causing the 24 hour delay in Rubin's surrender." *Id.*

The Supreme Court has observed that a conflict of interest has detrimental effects on representation "because of what it tends to prevent the attorney from doing." *Holloway*, 435 U.S. at 489-90, 98 S.Ct. 1173. An adverse effect can be shown from an attorney's "failure to take actions that are clearly suggested from the circumstances." *Tatum*, 943 F.2d at 376. Here, the circumstances suggested that Rubin might have been helped by Longest and Gavin testifying. Rubin has shown that this was a plausible alternative defense strategy which was reasonable under the facts of the case and that the failure to pursue this strategy was linked to Longest and Gavin's conflict of interest. We agree with the district court that "[b]y failing to draw the spotlight on their own actions, whether for financial reasons (to remain in the case and gain a substantial fee) or out of fear for their own criminal liability, [Longest and Gavin] lapsed in their duty of representation." *Rubin*, 128 F.Supp.2d at 869.

2.

Second, Longest and Gavin's conflict of interest ultimately tainted and adversely affected Rubin's representation by her three trial attorneys. Longest and Gavin violated the most basic principles of the attorney-client compact from the beginning to the end of Rubin's representation. The taint from their conflict of interest could not be cleansed simply by bringing in independent counsel to make trial decisions while Longest and Gavin continued to function as members of the defense team. The Court of Special Appeals' conclusion that attorneys as conflicted as Longest and Gavin could somehow remain active in Rubin's case as long as they did not control trial strategy was an objectively unreasonable application of the *Sullivan* standard.

We do not call into question the state court's factual finding that Rubin's trial lawyers made the decision to not call Longest and Gavin as witnesses. However, the alternative decision was effectively unavailable to them. To discharge Longest and Gavin from the defense team and call them as witnesses, Helfand, Goldstein, and Joseph would have had to oust fellow members of the bar who had been the ones to recommend their services in the first place. They could hardly consider the benefits of calling Longest and Gavin as fact witnesses while Longest and Gavin were still functioning as Rubin's attorneys. This adversely affected Rubin's representation.

This court, applying *Sullivan*, has previously held that a conflicted attorney can taint trial counsel and render trial counsel's performance ineffective. In *Tatum*--a case that amazingly involved the very same David Gavin whose conduct is at issue in this case--this court concluded that bringing in independent trial counsel does not necessarily cleanse a serious conflict of interest if the conflicted attorney continues as a member of the defense team. *Tatum*, 943 F.2d at 378-79.[3]

"The present case replays *Tatum* almost exactly." *Rubin*, 128 F.Supp.2d at 869. *Tatum* suggests that it is almost Longest and Gavin's modus operandi to represent people in a questionable capacity pretrial and then remain as a shadow team at trial after bringing trial counsel "up to speed." *See Rubin*, 128 F.Supp.2d at 868. As in Rubin's case, Gavin was a potential fact witness for Tatum because Gavin's firm had apparently advised Tatum to do what he was being prosecuted for. *Tatum*, 943 F.2d at 373-74, 376-77. Instead of withdrawing from the case, Gavin continued to represent Tatum, thus attempting to deflect attention from his own actions and his firm's behavior. *Id.* at 377, 379. The State argued, just as it does in Rubin's case, that there was no ineffective assistance of counsel because Gavin did not represent Tatum at trial. *Id.* at 377-78. This court rejected that argument, finding that it would never occur to Tatum's trial counsel to call Gavin as a witness with Gavin continuing to serve as co-counsel. Even though Gavin and Tatum's trial counsel made contributions to Tatum's defense that "varied in function and degree," the "joint effort by the two, when one was so completely disqualified, caused an unwitting, but disqualifying, taint to the other." *Id.* at 378. Just as in *Tatum*, Rubin's trial counsel's performance was tainted by the fact that Longest and Gavin continued to participate as members of the defense team.

C.

The adverse effect Longest and Gavin's conflict of interest had on their own representation of Rubin and the taint the conflict had on Rubin's trial counsel establishes ineffective assistance of counsel under *Sullivan*. The State argues that Helfand, Goldstein, and Joseph's strategic decision to not call Longest and Gavin to the stand was reasonable and did not prejudice Rubin. The State asserts that Longest and Gavin's testimony might actually have harmed Rubin's defense by, *inter alia*, allowing the prosecution to delve into the attempted poisoning of Rubin's former lover, Glisson, and into the fact that Rubin had sought immunity in association with that poisoning.

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[3] Of course, in keeping with the requirements of *Bell v. Jarvis*, 236 F.3d at 162, the case on which this court has plainly relied is *Cuyler v. Sullivan*. The use of *Tatum* is purely illustrative.

These arguments are unavailing. With the conflict of interest established and the adverse effect on her representation shown, Rubin has carried her burden under *Sullivan*, 446 U.S. at 349-50, 100 S.Ct. 1708. Longest and Gavin's representation of Rubin was more than ineffective--it was a perversion of the attorney-client relationship. Longest and Gavin's conflict of interest was so severe that it led to a corruption of the adversarial process that our system relies on to produce just results. It is hard to imagine a case that would call the fundamental fairness of a trial into more question than this one. What happened here should never happen in our system. Rubin is entitled to a new trial with conflict-free representation.

IV.

For the foregoing reasons, we affirm the judgment of the district court and grant Rubin's petition for a writ of habeas corpus on the same terms ordered by the district court.

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

Today this court grants a writ of habeas corpus to Lisa Joyce Rubin, who, it concedes, unquestionably "shot and killed her husband," and whom a Maryland jury convicted of first-degree murder. The court grants habeas relief to Rubin (an honors college graduate) on the theory that she received ineffective assistance of counsel at her trial. Yet for six months prior to that trial, a team of three lawyers specializing in criminal law planned her defense and formulated trial strategy; this team represented Rubin at trial, examining witnesses, making objections, and asserting legal arguments on her behalf. The majority does *not* fault the skill or ethics of these three lawyers, whom the state court described as "highly qualified and experienced criminal defense counsel." Rather, the majority grants habeas relief because of a conflict of interest of two *other* attorneys, who advised Rubin in the hours and days immediately after she killed her husband. Although the two conflicted lawyers continued to meet with Rubin, they did not try her case, direct trial strategy, sit at counsel table, or even enter an appearance on her behalf in the trial court. The Supreme Court has never established--let alone clearly established--that a conflict of interest violates the Sixth Amendment under these circumstances.

This is not to say that the two conflicted lawyers--David Gavin and Darryl Longest--acted properly. They did not. Driven by their own financial interests rather than their client's interests, they certainly violated the ethical codes that govern all lawyers, and they may have committed crimes. I join in the majority's reprobation of their conduct. Indeed, were I left to my own devices to determine when a conflict of interest yields constitutionally ineffective assistance of counsel, I might endorse the conclusion that the existence of case-related contact between the conflicted and the unconflicted lawyers tainted the latter. But we are not free to do that. Instead, we must apply controlling law, including the deferential standard of review in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C.A. § 2254(d)(1) (West Supp.2001), which requires us to deny habeas relief unless we find a state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." In this case, I cannot so find.

Accordingly, I must respectfully dissent from the majority's contrary holding.

I.

The sole Supreme Court case cited as "the clearly established Federal law" authorizing habeas relief here is *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). *See ante* at 402, and 406 n. 3. That case dealt with a conflict of interest involving dual representation--the same two attorneys represented three co-defendants, with conflicting interests, at three separate criminal trials. *Id.* at 337-40, 345-49. *Sullivan* provides no direct support for a finding of unconstitutional conflict of interest on the very different facts at issue here. Indeed, to the extent *Sullivan* has any specific relevance to this case, it suggests no conflict exists here. *See infra* n. 5. Under circuit precedent, however, *Sullivan* does establish the relevant standard for assessing conflict of interest claims like the one at issue here. *See United States v. Tatum*, 943 F.2d 370, 375-76 (4th Cir.1991); *but see Beets v. Scott*, 65 F.3d 1258, 1272 (5th Cir.1995) (en banc) (holding that the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), rather than *Sullivan's* "more rigid rule," applies to "attorney breaches of loyalty outside the multiple [or successive] representation context"). *Sullivan* requires that "a defendant who raised no objection at trial [like Rubin] must demonstrate that [1] an actual conflict [2] adversely affected his lawyer's performance." 446 U.S. at 348, 100 S.Ct. 1708. The majority iterates and reiterates Gavin and Longest's actual conflict, but offers only two reasons why this conflict "adversely affected Rubin's representation." *Ante* at 404. Neither is at all persuasive.

A.

First, the majority contends that "Longest and Gavin's *direct representation* of Rubin was adversely affected by their conflict of interest." *Id.* (emphasis added). Specifically, the majority agrees with the district court that Longest and Gavin should have testified at Rubin's trial to "draw the spotlight on their own actions." *Rubin v. Gee*, 128 F.Supp.2d 848, 869 (D.Md.2001).

To demonstrate "adverse effect," however, a defendant must not only "identify a plausible alternative defense strategy his defense counsel might have pursued," but also must: (i) show that this strategy was "objectively reasonable," i.e., "clearly suggested by the circumstances," "under the facts of the case known to the attorney at the time of the attorney's tactical decision," *and* (ii) establish a link between the conflict and the failure to pursue the strategy. *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir.2001) (en banc) (citation omitted), *aff'd*, ___ U.S.___, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002). The majority utterly fails to demonstrate that the proffered alternative defense strategy--calling Longest and Gavin to testify--was "objectively reasonable" or not "pursue[d]" because of Longest and Gavin's conflict. *Id.* Thus, even if we were free to ignore the stringent standard of review mandated by AEDPA and to ask simply whether the decision not to call Longest and Gavin had an adverse effect on Rubin's representation, Rubin could not prevail on this claim. Taking account of the limitation AEDPA places on our review, there is no way to conclude that the state court's contrary determination was unreasonable.

Testimony from Longest and Gavin simply would not have helped Rubin and, therefore, offering this testimony at trial would not have been "objectively reasonable." *Id.* At the state post-conviction hearing, Rubin's two surviving trial lawyers (one had died before the post-conviction proceeding occurred) recounted their struggles to formulate a defense theory around Rubin's shifting and incomplete account of the night she shot her husband. They explained, at length, the multiple problems with introducing testimony by Longest and

Gavin, as well as the incompatibility between such testimony and their trial strategy. Their explanation establishes beyond doubt that calling Longest and Gavin, though superficially plausible, was not an "objectively reasonable" strategy that was "clearly suggested by the circumstances." *Id.* (citation omitted).

First, testimony from Longest and Gavin, who knew a great deal about Rubin's activities and statements after the killing and at other times, would have opened the door to much damaging evidence. After Rubin shot her husband, she first telephoned Robert Miller, a private detective with whom she had a "personal relationship" including late night dinners, assistance in finding a new home, and personal confidences. *See Rubin v. State*, 325 Md. 552, 602 A.2d 677, 679 (1992); *Rubin v. Gee*, 128 F.Supp.2d at 852 (quoting closing argument). Miller arrived at the scene with his assistant, another private detective named Robert Leopold, viewed the body, and telephoned Longest. Not until an hour after the detectives' arrival did Longest and Gavin arrive at the scene.

If Longest and Gavin had testified, the jury would have heard that right after Rubin repeatedly shot her husband, reloaded, fired five additional bullets into his back as he lay face down, and reloaded again--all supposedly in a frenzy of terror--she developed the presence of mind to stay in the vicinity for an extended period to consult at length with her private detectives and lawyers. The jury would have heard details including the three hours Rubin spent at the scene without calling an ambulance. With this fodder, the prosecutor could have extensively elaborated on his brief comments on the point that the first person Rubin called was *not* a lawyer but Robert Miller, her intimate.[1] We can ascertain this much even from the minimal information that Longest and Gavin have disclosed to date. *See Rubin v. State*, 602 A.2d at 682-84; Answer to Petition for Habeas Corpus, Ex. 2 at 96 et seq. (containing the scant post-conviction testimony by Longest concerning the events of the night of the killing and no testimony by Gavin).

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[1] The state courts never fully resolved the question whether Longest or Miller gave the instruction to use an alias in checking Rubin into the hospital. Direction by Miller, Rubin's intimate who was not a lawyer,

(continued...)

In addition, a substantial portion of the night's activities has never emerged, because Rubin did successfully assert the privilege with respect to Longest and Gavin, and with respect to her communications with Miller and Leopold after Longest and Gavin arrived at the scene of the shooting. We cannot know what other damaging statements or observations, made after the privilege arose, Longest and Gavin (and Miller, Rubin's intimate) would have had to relate, if Rubin had waived the privilege. We do know that without sacrificing the privilege as defined by the trial court,[2] or otherwise harming Longest or Gavin's interests in the slightest, the defense could have called Rubin's private detective (and good friend), Miller, to describe his several lengthy one-on-one conversations with Rubin at the scene before Longest and Gavin arrived. *See* Answer to Petition, Ex. 2 at 173, Ex. 4 at 54-57, 70. If the defense had believed such testimony about Rubin's behavior or conversation soon after the killing would have assisted her, Miller, an obviously friendly witness, was certainly available to testify. Yet the defense chose not to open that door, in a decision that no one does, or could, attribute to a desire to

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[1](...continued)
see Rubin v. State, 602 A.2d at 679, would obviously not have resonated to her benefit.

[2] Over defense objections, the trial court ruled that the attorney-client privilege arose not when Rubin's private detectives, Miller and Leopold, arrived at the crime scene, but only later, when her attorneys, Longest and Gavin, arrived. *See Rubin v. State*, 602 A.2d at 683-84 (describing and affirming this ruling).

protect Longest and Gavin.

To be sure, the prosecution made good use of the missing pieces in Rubin's account, pointing out that she had left the scene of the shooting and had checked herself into the hospital under a false name; and if Longest and Gavin had testified the jury would probably have heard that they told Rubin to leave and use an alias. *But see supra* n. 1. But the same prosecutor who used the missing pieces in Rubin's story to the State's advantage could certainly have made hay out of Longest and Gavin's more detailed account of Rubin's behavior--amplified by whatever additional facts a waiver of privilege might have revealed through testimony by Longest, Gavin, or Miller.

Moreover, even if calling Longest and Gavin had been a more attractive option, the decision not to call them was part of the broader defense strategy aimed at allowing Rubin to escape conviction altogether. Rubin's team of trial lawyers explained that they focused on asserting attorney-client privilege as a way to exclude the testimony of her other private detective, Robert Leopold, which, they believed, was so uniquely damaging to Rubin that if it could be excluded as privileged, Rubin would walk free.[3] Of course, as it turned out, the trial court permitted Leopold to testify, and on appeal this was held to be only harmless error. *See Rubin v. State*, 602 A.2d at 684-90. But at the time, trial counsel hoped to exclude Leopold's observations, leaving a far greater area of doubt as to events surrounding the shooting.

Trial counsel's lucid explanations, both of the trial strategy they followed and of the danger to Rubin in the strategy she now suggests, clearly show why testimony by Longest and Gavin was not an "objectively reasonable" alternative strategy that the circumstances at trial "clearly suggested." *Mickens*, 240 F.3d at 361. In sum, the pitfalls involved in Longest and Gavin's testimony about the night of the killing and the possibility of excluding Leopold's testimony and leaving massive gaps in the State's case demonstrate that under any standard, Rubin has not shown that the decision not to call Longest and Gavin had an adverse effect on her defense.[4]

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[3] Leopold was the only witness who testified that Rubin's purse contained bullets fitting the gun she said her husband had brought to the scene.

Applying the stringent AEDPA standard of review, as we must, renders this conclusion inescapable. On habeas review we may only reverse the state post-conviction court if its determination was "contrary to, or involved an unreasonable application of" clearly established federal law. 28 U.S.C.A. § 2254(d)(1). In this case, the state post-conviction appellate court concluded that "it is understandable why [Longest and Gavin] were never called to the stand by the defense team." Considering the perils on the road not taken, I can only agree.

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[4] The district court also held that Longest and Gavin denied Rubin effective counsel during the pretrial phase. *See Rubin v. Gee*, 128 F.Supp.2d at 865-68. However, the court pointed to no specific adverse effect of Longest and Gavin's out-of-court activities after trial counsel entered the case, *see id.* at 866-67, and it is difficult to see how their presumed desire to avoid testifying could have affected trial preparation, given the very limited out-of-court work that even the district court attributed to them. *Id.* at 867. I note that a grand jury indicted Rubin, so her initial waiver of indictment had no effect whatsoever on her trial. Nor is it plausible that prosecutorial focus on Longest and Gavin before trial would have diverted the prosecutors' attention from Rubin. The prosecutors were investigating Longest and Gavin well prior to Rubin's trial, *see ante* at 404, making it clear to Rubin's three other, non-conflicted lawyers that they had the option of throwing Longest and Gavin to the wolves. Moreover, in view of the fact that Rubin alone shot her husband, the prosecutors were hardly likely to immunize her or allow her to plead to an equivocal account of the killing in order to pursue her counsel for obstruction of justice. Perhaps for these reasons, the majority tellingly does *not* hold that Longest and Gavin denied Rubin effective counsel during the pretrial phase.

In any event, the state post-conviction court's conclusion that Rubin suffered no adverse effect from the decision not to call Longest and Gavin--that calling them was not an "objectively reasonable" strategy that was "clearly suggested by the circumstances"--was certainly not itself objectively unreasonable.

Finally, and most basically, the majority's contention--that "Longest and Gavin's direct representation of Rubin was adversely affected by their conflict of interest" because they determined they would not testify at trial--rests on a false premise. *Ante* at 404-05. In fact, Longest and Gavin *did not determine* that they would not testify. Rather, as the state court expressly held, the "choice to offer [their] testimony was neither Longest's or Gavin's to make." Instead, like all "trial strategy" decisions, the state court held that the decision as to whether Longest and Gavin would testify was made by the three "outstanding attorneys," *Rubin v. Gee*, 128 F.Supp.2d at 862, who represented Rubin at trial. The majority expressly states that it does "not call into question the state court's factual finding that Rubin's trial lawyers made the decision to not call Longest and Gavin as witnesses." *Ante* at 405. Given this state-court finding, Rubin has not established and cannot establish the necessary "link[ ]" between Longest and Gavin's "actual conflict" and the decision she challenges. *See Mickens*, 240 F.3d at 361.

Therefore, the majority's first reason for concluding that Longest and Gavin's conflict of interest "adversely affected Rubin's representation," *ante* at 404, unquestionably fails.

B.

The majority's only other rationale for concluding that Longest and Gavin's conflict of interest adversely affected Rubin's representation is that this conflict assertedly tainted Rubin's three trial counsel, Barry Helfand, Alan Goldstein, and Fred Joseph. The majority does not suggest that any member of the three-man trial team, himself, had any conflict of interest with Rubin. Nevertheless, the majority concludes that the conflict of interest of non-trial counsel (Longest and Gavin) infected the trial team. Maybe so, but the Supreme Court has never endorsed such a theory.[5]

In holding to the contrary, the majority heavily relies on our precedent, *United States v. Tatum*, 943 F.2d at 373-79. Recently, however, the Second Circuit reached the opposite conclusion, finding that "because [a conflicted lawyer] had no input into trial strategy, his participation [at trial] does not require *per se* reversal." *Triana v. United States*, 205 F.3d 36, 42 (2d Cir.2000). *But see Tatum*, 943 F.2d at 378 ("From the necessary conclusions that [the conflicted lawyer] was an acknowledged source of information to [the non-conflicted lawyer] and [the latter] ... felt the need to have [the conflicted lawyer] present throughout the trial, we conclude that the presentation of [the] defense was the product of both ..., even though their contributions may have varied in function and degree.").

Although I certainly prefer our approach, in light of the Supreme Court's silence on the point, it is impossible to conclude that it was "clearly established," as a matter of *Supreme Court* law, that our rule must be followed. *See* 28 U.S.C.A. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412,

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[5] Indeed, in *Sullivan* the Court specifically noted that both conflicted lawyers "played *important roles* at all three [defendants'] trials," as a predicate for its holding that the defendant had proved an actual conflict of interest. *See Sullivan*, 446 U.S. at 342, 100 S.Ct. 1708 (emphasis added). Although for clarity's sake, I follow the majority's lead in treating taint as an "adverse effect" question, the context of the *Sullivan* Court's comment suggests that actually it may be more properly analyzed as a question of whether an "actual conflict" exists. *See also Beets*, 65 F.3d at 1277-78. Viewed that way, I would conclude, for the reasons set forth in text, that no "clearly established Federal law as determined by the Supreme Court," 28 U.S.C.A. § 2254(d), holds that counsel in the position of Rubin's three-man trial team had an actual conflict of interest.

120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Indeed, the circuit split exhibited by *Triana* and *Tatum* testifies to the absence of any Supreme Court case that resolves the question. Nor can I conclude that the state court's application of *Sullivan*, echoing that of the Second Circuit in *Triana*, was objectively unreasonable.

Even if we could rely on our circuit precedent (ignoring well-reasoned contrary precedent of a sister circuit) as indicative of "Federal law, as clearly established by the Supreme Court" or as limiting objectively reasonable applications of that law, numerous distinctions between Rubin's case and *Tatum* prevent reliance on *Tatum* here. Given these factual and legal distinctions, it is doubly difficult to see how the state appellate post- conviction court's conclusion, that Longest and Gavin's conflict did not render the assistance of Rubin's three trial counsel constitutionally ineffective, was an objectively unreasonable application of federal law as established by the Supreme Court.

First, the nature of Longest and Gavin's work for Rubin dramatically differed from that of the conflicted lawyers in *Tatum* (and *Triana*) for their clients. The taint we considered in *Tatum*--from a conflicted lawyer who appeared at trial, "helping" trial counsel "throughout the presentation for this trial" to "bring [trial counsel] up to speed"--is simply not implicated in Rubin's case. *Tatum*, 943 F.2d at 378; *see also Sullivan*, 446 U.S. at 342, 100 S.Ct. 1708 (noting that the conflicted lawyers involved "played important roles at all three [defendants'] trials"). Rather, the surviving two members of the trial team have unequivocally testified--and the state post-conviction court has found--that they, *not* Longest and Gavin, made *all* the strategic trial decisions, in accord with their own views of "the best interest of Lisa Rubin," and that they made no decisions in order to protect Longest and Gavin.[6] As one of them testified, "[N]ever, at any time, was there any indication whatsoever that any discussion of strategy was based upon any relationship ... [t]hat any of us had with anyone in the world other than [Rubin]." Consistent with this account, neither Longest nor Gavin planned the course of the trial, delivered an opening statement or closing argument, examined a witness, or took part in the trial in any way. Indeed, far from guiding and educating trial counsel in court as in *Tatum* or *Triana*, Longest and Gavin *never appeared at trial* or even *noted their appearances* in the trial court on behalf of their client.

Second, also unlike the conflicted lawyer in *Tatum*, who had allegedly recommended commission of the charged crime, Longest and Gavin gave relevant advice only *after* the crime had been committed. *Cf. Tatum*, 943 F.2d at 374 (noting that the conflicted attorney allegedly recommended the act in question, a bankruptcy fraud). Such advice, unlike that of the lawyer in *Tatum*, does not directly illuminate Rubin's intent at the time of the act. More broadly, Rubin's act--shooting her husband--differs greatly from the financial crime addressed in *Tatum*, in which advice of counsel might even have excused the entire act; in *Tatum* the defendant might have blamed the conflicted lawyer for recommending the very act that was the center of the trial. Factual testimony by Longest and Gavin could not have directly altered the law's treatment of the shooting itself.

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[6] The state post-conviction court found that Longest and Gavin's *only* contribution after Rubin turned herself in was "'paralegal/investigative' work." The district court rejected this finding, *see Rubin v. Gee*, 128 F.Supp.2d at 869-70, largely on the basis of Longest and Gavin's self-serving letter justifying their attorney fees. On examination, however, that letter simply shows that Longest and Gavin scurried around to keep Rubin happy and to retain the substantial fees she had paid them, not that they did more than "paralegal/investigative work." In any event, the majority (although discussing the letter at length) does not reject the state-court finding as to the limited paralegal nature of Longest and Gavin's work or the state-court finding that Longest and Gavin had no effect on trial strategy. *See ante* at 404-05, 405-06. Accordingly, we are bound by those findings. *See* 28 U.S.C.A. § 2254(d)(2), (e)(1). In light of them, the majority's taint discussion rests on a sandy foundation indeed.

Third, *Tatum*, unlike the case at hand, did not involve federal review of a state conviction. The claim of the defendant in *Tatum* therefore simply did not implicate the "significant interest[ ] in ... federalism that underlie[s] the federal habeas scheme." *Evans v. Smith*, 220 F.3d 306, 321 (4th Cir.2000). In contrast, when considering Rubin's claim, we must bear in mind the "important interest[ ] in ... respect for state court judgments that underlie[s] the statutory habeas scheme." *Id.* at 323. Congress's enactment of the AEDPA, which occurred after we decided *Tatum*, further heightens the importance of these federalism concerns. To overturn the reasoned decision of a state court on the basis of our precedent, rationally disputed by another circuit and neither addressed nor confirmed by the Supreme Court, would erode the balance that both our federalist Constitution and the AEDPA are meant to protect.

In sum, given the relevant circuit split on facts that more obviously support a finding of ineffective assistance--that is, in cases where the conflicted lawyer appeared at trial and where the facts concerning the lawyer's role were more directly exculpatory--I cannot conclude that the state appellate post-conviction court unreasonably applied Supreme Court law by declining to rule that Longest and Gavin tainted the effectiveness of Rubin's trial team. Indeed, scrupulous adherence to *Mickens*, 122 S.Ct. at 1245-46 (emphasizing the importance of actual representation of conflicting interests for the presumption of prejudice), would seem to compel denial of habeas relief in this case. For these reasons, the majority's only remaining rationale for finding adverse effect also clearly fails.

II.

In the months between April 24, 1990, the night Lisa

Rubin shot her husband, and November 11, 1990, the day she was convicted of his murder, she employed five lawyers. Although two of them, Longest and Gavin, served her poorly on the night of the killing, three other talented lawyers took over within days of the killing *and* prepared her case for over *six months* before trial. The state court specifically found that those three "highly qualified and experienced criminal defense counsel" alone fashioned Rubin's defense, and represented her at trial. Those three lawyers made the tactical decision to advise Rubin to assert privilege with respect to her conversations with Longest and Gavin. Those three lawyers reached this decision to avoid opening the door to everything Longest and Gavin knew about Rubin's tangled relationship with her husband and her incriminating behavior after she killed him. Neither the majority nor the district court suggests that any one of those three lawyers did not skillfully represent Rubin or had an interest conflicting with Rubin's.

The only conceivable reason anyone would think of faulting the performance of trial counsel is some kind of taint from the two conflicted lawyers who took no part in the trial. But the Supreme Court has *never* held that a non- participating lawyer's conflict could so infect otherwise unconflicted lawyers' representation as to render the latter's representation constitutionally ineffective. Even when a conflicted lawyer *appears at trial and handles trial work*, the circuits have divided as to whether a conflicted lawyer can taint the representation of other, otherwise unconflicted lawyers.

Against this legal and factual background, I cannot conclude that the state court's decision rejecting Rubin's ineffective-assistance claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C.A. § 2254(d)(1). I therefore respectfully dissent.

APPENDIX C

United States District Court,
D. Maryland.

Lisa Joyce RUBIN Petitioner
v.
Archie GEE, Director, et al. Respondents

No. CIV. PJM 99-621.

Feb. 7, 2001.

MESSITTE, District Judge.

I.

On November 11, 1990, a jury in the Circuit Court for Montgomery County, Maryland, convicted Lisa Joyce Rubin of the crimes of first degree murder and the use of a handgun in a crime of violence. She was sentenced to life in prison, all suspended except for 30 years on the murder charge and 20 years on the handgun charge, the sentences to run concurrently.

Rubin appealed to the Maryland Court of Special Appeals, but before that court could consider the case, the Maryland Court of Appeals granted *certiorari* and affirmed her convictions. *See Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992).

On September 29, 1995, Rubin filed a petition for post-conviction relief in the Circuit Court for Montgomery County. Following an evidentiary hearing, the post-conviction court (James L. Ryan, Judge) granted the petition and ordered a new trial. The State of Maryland then filed an application for leave to appeal to the Court of Special Appeals. On November 6, 1997, without the benefit of a transcript of the post-conviction hearing (which the State had not ordered) and apparently without the benefit of full briefing, the Court of Special Appeals, in an unpublished opinion, summarily reversed the Circuit Court's order granting a new trial. When Rubin filed motions for leave to supplement the record and for reconsideration, the Court of Special Appeals recalled its opinion but soon after, in a second unpublished opinion dated July 28, 1998, again reversed the decision of the Circuit Court. Rubin's application for *certiorari* to the Maryland Court of Appeals was denied. *See Rubin v. State*, 351 Md. 663, 719 A.2d 1262 (1998).

The present petition for habeas corpus relief followed.

Rubin argues in this Court that the decision of the Court of Special Appeals was constitutionally infirm as a matter of law and fact in that it improperly denied her claim of ineffective assistance of counsel based on her attorneys' conflict of interest. The Court agrees.

II.

A) There is no question that on April 24, 1990, Rubin shot and killed her husband, Timothy Warner. Rubin claimed that she acted in self-defense.

At the time, she and her husband were beginning divorce proceedings. According to Rubin--who was the only witness called by the defense at trial-- certain critical facts pertaining to the couple's relationship led up to the homicide. During her marriage, Rubin had had an affair with a William Glisson, at the end of which Glisson physically assaulted her, injuring her wrist. Rubin and Warner subsequently brought a civil action against Glisson which went to trial in January 1989. During that trial, Glisson was poisoned when he drank out of a Coca-Cola bottle that lab tests revealed contained a cyanide substance. No one was ever charged in connection with that incident.

Following the trial against Glisson, Rubin and Warner separated. Rubin hired Prudential Associates, a private investigation company, to pursue the possibility that Warner might be having an affair. Robert Miller, President of Prudential, and Robert Leopold, an investigator at the company, worked on Rubin's case and soon determined that Warner was indeed having a liaison.

In April, 1990, the Glisson case resurfaced. In that month, Rubin told Miller that Warner had told her in January 1990 that it was he who had poisoned Glisson, revealing to her some of the details of his actions. Rubin, who was frightened of Warner,[1] wanted to inform the authorities of what she knew. In consequence, Miller referred Rubin to Darrel Longest, Esquire, a private attorney and formerly Deputy State's Attorney for Montgomery County, who she hoped would arrange for her to meet with the authorities, disclose what she knew about the poisoning, and obtain immunity for her. Rubin quickly retained Longest, who immediately hired Miller to work as his investigator in the case. By April 10, Longest had arranged with Matthew Campbell, Deputy State's Attorney for Montgomery County, for Rubin to receive immunity in the Glisson matter. On April 20, Longest and Rubin had a meeting with Montgomery County Detective Charles Shawen at Longest's office, during which Rubin told Shawen what Warner had confessed to her about the poisoning.

In the late afternoon or early evening of April 24, 1990--four days after she had met with Detective Shawen--Rubin met with Warner at a veterinary clinic in Gaithersburg in order to have the couple's dog Mutley put to sleep. Rubin testified that at the meeting, during a walk with Warner and the dog in the woods behind the clinic, she brought up the fact that Warner had admitted that it was he who had poisoned Glisson.[2] Rubin testified that Warner told her she had better not tell anyone about that, but Rubin said it was too late, that she had already gone to the authorities. According to Rubin, Warner became enraged and pulled out what Rubin believed to be a gun. She therefore took her Smith and Wesson handgun from her purse and shot him. She testified that because he kept coming at her, she shot him again--a total of 8 shots, 3 in his chest or arms and 5 more in the back, including a reloading.

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[1] Rubin testified at trial that, in the course of these events, her fear of her husband had led her to purchase two handguns, a .38 caliber Ladysmith model Smith and Wesson and a .22 caliber Beretta. One of these, she said, she intended to carry on her person, the other she would keep at her home. *See Rubin*, 325 Md. at 557-59, 602 A.2d at 679-80.

Rubin then went back to the veterinary clinic where she called Miller in an effort, she testified, to reach Longest. Reaching Miller, she arranged to meet him at a neutral point from which the two of them, together with Leopold, returned to the scene of the crime. In short order, but before the police were contacted, Longest and Gavin were called and arrived on the scene.

The Court of Special Appeals, in its opinion of July 28, 1998, accepted without dispute the following additional facts found by the post-conviction hearing judge pertaining to the night of the homicide:

> Petitioner [Rubin] had apparently taken a large amount of medication, and Longest told Miller and Leopold to take her to the hospital for a possible drug overdose and have her admitted under a false name. Miller and Leopold transported Petitioner to Montgomery General Hospital and checked her in under the name Sharon Peterson. [Judge Rodowsky in his Opinion for the Court of Appeals stated that Mrs. (sic) Rubin was "registered" at the hospital but was not admitted for treatment.] Petitioner

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[2] "Rubin's version of the events is that she had hoped to record at the meeting Warner's admissions of attempted murder." *Rubin*, 325 Md. at 561, 602 A.2d at 681. Following the homicide, a minicassette recorder and two minicassette tapes were found in Rubin's purse. *See id.* at 683.

> was discharged at 3:00 a.m. on April 25 and spent the remainder of the night at Miller's house. While petitioner was at the hospital, Longest notified the police that Warner was dead, but did not disclose petitioner's identity, and the crime scene was then processed.
>
> Petitioner spent the rest of April 25 with Longest and Gavin. Gavin drove Petitioner to her bank to withdraw $105,000 to be used as a retainer fee and to cover expenses. In addition, Longest took possession of some of her property, which included a jacket, a purse, .22 caliber bullets and a .38 caliber Smith and Wesson handgun. These items were kept at the law offices of Longest and Gavin. After discussions with the Office of the State's Attorney, during which it was discovered there was a warrant out for petitioner's arrest, petitioner was turned in to the police that evening at 7:00 p.m.

State v. Rubin, No. 38, September Term, 1997, slip op. at 3-4 (Md.Ct.Spec.App. July 28, 1998).

Except for testifying that she went to the hospital following the homicide, none of the facts set out in the foregoing two paragraphs of the Court of Special Appeals' opinion were brought out during Rubin's direct trial testimony. It was left for the prosecution--with careful pruning of any reference to Longest and Gavin's role--to bring out the more salient points on cross-examination:

> Q. You went to the hospital and said that you attempted to commit suicide because of a drug overdose. Is that right? ...
>
> The Witness. I didn't check myself in. I don't know what they said.
>
> Q. Well, when you went there, what was the purpose of your visit?

A. They decided to take me there.

Q. They decided to take you there. Didn't you relay information to the private investigators that you had tried to overdose after the fact and that you tried to kill yourself?

A. No.

Q. No? When you went there, wasn't the name Sharon Peterson initially given to the hospital?

A. Not by me.

Q. The private investigators gave the name Sharon Peterson?

A. I don't know who gave the name ...

Q. It is only after the private investigators and everyone starts calling you Lisa and the hospital staff said "Why is she going by Lisa," that then you correct the record and give your proper name as Lisa Rubin. Is that right?

A. I couldn't have corrected a record that I didn't know wasn't correct in the first place.

* * * * * *

Q. When you turned yourself in, the police had an arrest warrant for you, did they not?

A. Yes.

* * * * * *

Q. Was Mr. Longest aware of the fact that you spent the night at Mr. and Mrs. Miller's?

A. Yes.

* * * * * *

Longest and Gavin did not serve as Rubin's trial counsel. On their recommendation, Rubin had engaged Barry Helfand in this capacity and Helfand in turn engaged Alan Goldstein to assist him.[3] Nevertheless, though neither sat at counsel table during the trial, Longest and Gavin at all times remained as co-counsel up to and throughout the trial.[4] Neither Longest nor Gavin was called at trial to testify as to their role in directing the actions that Rubin took following the homicide.

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[3] Rubin subsequently hired Fred Joseph to serve as additional co-counsel.

In his closing, however, the prosecutor referred to those actions:

> [Rubin] ends up spending that night with [Mr. Miller] and she meets with him and brings him back to the scene and then after the lawyers get involved she goes into the hospital and checked in under a fake name, Sharon Peterson, and then spends the night at Mr. Miller's house. Only after the police get a warrant and they put the case together and she is notified of that warrant, then she turns herself in at the police station. Does she flee from this scene? You bet. Does she lie? You bet. Does she show consciousness of guilt? In other words, "I am an innocent man. Let's go to the police. I will explain what happened." Never. Never.

The jury's verdict of guilty on the first-degree murder and handgun charges followed shortly after.

III.

The core defense strategy in the case, as suggested by the Maryland Court of Appeals on direct appeal, was that Longest and Gavin had an attorney-client relationship with Rubin such that Leopold, as an agent of Longest and Gavin, should have been prohibited by the privilege from testifying when called as a cooperating witness by the State. *See Rubin*, 602 A.2d 677. The Court of Appeals agreed with that proposition but a majority of the court (over a vigorous dissent by then Associate, now Chief Judge, Bell) held that even without Leopold's testimony it could not be said that reasonable doubt existed as to Rubin's guilt. The convictions were thus affirmed.

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[4] The nature and extent of Longest and Gavin's role as co-counsel will be discussed in the course of this Opinion.

In the course of its opinion, the court touched upon the legal and ethical correctness of Longest and Gavin's removal, possible alteration and retention of evidence. Indeed, the State had argued that because of Longest and Gavin's actions in removing the evidence, the crime-fraud exception to the attorney- client privilege was brought into play and as a result Leopold was correctly permitted to testify.[5] The court, as

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[5] The State's brief on appeal included this paragraph:

> The crime-fraud exception applies to defeat the client's privilege even "where the pertinent alleged criminality is solely that of the law firm." *In re Impounded Case (Law Firm)*, 879 F.2d 1211, 1213 (3rd Cir.1989). In deciding whether the exception applies there must be a *prima facie* showing of criminal and fraudulent conduct ... no doubt this exception applies in the instant case given the conduct of Rubin and her attorneys Longest and Gavin.
>
> After killing her husband, Rubin called investigators Miller and Leopold and directed them to the crime scene. They altered the crime scene by unleashing the dog Muttley (sic) from Warner's dead body (E .289-90). After Longest arrived, he directed the investigators to take Rubin away from the murder situs, to check her into a hospital using a false name, and not to tell anyone what had happened (E.17, 512). Longest took possession of the murder weapon, Rubin's purse and the .22 caliber bullets contained therein, placing them in his law office (E.339-41, 345-46). This evidence too was altered, in that the bag of bullets was removed from Rubin's purse where they earlier had been seen by Leopold (E.345-46, 299-300).
>
> The above facts make out a *prima facie* case of several crimes. One may be an accessory after the fact to

(continued...)

indicated, disagreed, holding that the privilege applied but that permitting Leopold's testimony was harmless error.

At no point, however, did the court consider the propriety of Longest and Gavin's actions from the standpoint of ineffective assistance of counsel.[6] That issue remained, as is usually the case, more appropriate for collateral review. *See Kimmelman v. Morrison*, 477 U.S. 365, 378, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) ("A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case.") (internal citation omitted).

IV.

A) At the post-conviction hearing, Assistant Montgomery County State's Attorney Thomas Tamm, who had been called to the scene of the homicide on the night of its occurrence, testified as follows:

Q. Okay. Now did you also confer with

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[5](...continued)
a murder by altering the crime scene, attempting to harbor the accused, and secreting evidence of a crime. *Osborne v. State*, 304 Md. 323, 326, 499 A.2d 170 (1985). Similarly, these acts could constitute the crime of obstruction of justice under Article 27, § 27 of the Maryland Code. *See Romans v. State*, 178 Md. 588, 592, 16 A.2d 642 (1940), *cert. denied*, 312 U.S. 695, 61 S.Ct. 732, 85 L.Ed. 1131 (1941). And, the agreement by two or more persons to do these acts could constitute a criminal conspiracy. *See Monoker v. State*, 321 Md. 214, 221, 582 A.2d 525 (1990).

[6] Indeed, there is no indication that the Court of Appeals knew that Longest and Gavin had continued to serve as Rubin's co-counsel through the time of trial.

members of your office regarding the issue of Longest and Gavin refusing to answer any questions at the scene?

A. Yes, sometime during the day I discussed that.

Q. Was your concern specifically the issue or alleged issue of privilege?

A. Well, I mean, that is one of the issues. I thought they might be witnesses. There were just--there were quite a few numerous legal issues, it seemed to me--potential--that one of which was whether they could possibly have a privilege, basically an anticipatory privilege for something that they had-- you know, they had not been retained on--whether they were witnesses. I had asked them several questions if they had seen other individuals other their clients up at the scene, trying to get any sort of information that we could use for the investigation.

Q. And what was your concern at that point in time? This being the morning-- the day of April 25th about them being witnesses?

A. Well, I mean, then if they are witnesses, there would be a potential conflict of interest whether they could act in both capacities as legal counsel as well as be witnesses. I didn't think they should.

Q. Did you formulate a subject matter for which you thought they may be witnesses to? What particular subjects?

A. I thought they were fact witnesses.

Q. Okay. And potentially would it be fair to say they would potentially be fact witnesses for the State of Maryland?

A. Sure.

* * * * * *

Q. And would you tell us please who Mr. Leopold indicated provided the directive as to checking Mrs. Rubin into a hospital under a false name?

A. He indicated that Darrel Longest suggested that they--I think it was he and Mr. Miller take Ms. Rubin to Montgomery County General, which was not the closest hospital, and that they check her in under a false name.

Q. Okay. At this point in time when you heard this information, did you have concern about possible obstruction of justice on the part of Mr. Longest?

A. Yes. It was just--yes.

* * * * * *

Q. Were there concerns about when Miller and Leopold showed up at the Peachtree Veterinarian Clinic scene that there may have been physical tampering with evidence?[7]

A. That was a concern. There was also a concern as to whether they had removed evidence from the scene.

Q. Okay.

A. Somebody had removed evidence from the scene.

Q. In addition with the prospect of them having removed evidence, were they concerned about the fact that pictures had been taken by Mr. Miller and Mr. Leopold?

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[7] While not an issue before the Court, Miller's role on the night of the homicide is worth mentioning. The evidence showed that he and his co-investigator Leopold arrived on the scene before Longest and Gavin and that, at a minimum, Leopold unleashed the dog and Miller took a series of photographs. As with Longest and Gavin, Miller was not called as a witness at trial. Detective Daniel Waring testified at the post-conviction hearing that a warrant was actually drawn for Miller's arrest, possibly for obstruction of justice, but was eventually withdrawn.

A. Well, that was learned after Mr. Leopold was interviewed.

Q. And was that one of the concerns of the detective in the case?

A. Yes.

Q. Were they concerned about Ms. Rubin having been taken to a hospital in an attempt to check her in under a false name?

A. Yes.

Q. Were they concerned about her being physically cleaned up before she was turned in to law enforcement authorities?

A. Yes.

Q. Were they concerned about the clothing having been removed and cleaned before she was turned in to law enforcement authorities?

A. Yes.

* * * * * *

Q. Were they concerned about a weapon that may have been used missing for 24 hours from law enforcement authorities?

* * * * * *

Q. THE WITNESS: I think that there was a valid law enforcement purpose to try and find the weapon that was used.

BY MR. FINDLING:

Q. Were they concerned about the possible destruction of barium and antimony evidence that could have consisted on the person of Lisa Rubin, and or, any clothing or any articles she had on her person because of the 24-hour delay?

A. Yes.

* * * * * *

Q. Regarding all of these concerns that I have gone through with you, were they also concerned that these specific acts of tampering could have been perpetrated by the lawyers who reported to the scene as well--namely, Mr. Longest and Mr. Gavin? (Emphasis supplied)

* * * * * *

A. I think there was a concern shared by the police as well as us--or me.

Q. Okay. Us being--I am sorry?

A. I probably should say me.

* * * * * *

Q. Did Longest and Gavin contact you and indicate that they wanted to waive a grand jury presentation and instead have an information?

A. Yes.

Q. And they did that on behalf of Ms. Rubin; am I correct?

A. Right.

* * * * * *

Q. And a grand jury would involve bringing witnesses to testify; am I correct?

A. Right, under oath.

Q. Okay. And those witnesses under oath would in a general sense be required to talk about the activities of April 24, and for that matter, April 25 of 1990; am I correct?

A. Yes.

* * * * * *

Q. Based on your knowledge of the witnesses that you interviewed about the activities of April 24th and April 25 of 1990, would you expect that one or some of those witnesses in their testimony would at any point mention the name of Darrel Longest and David Gavin?

* * * * * * *

THE WITNESS: Yes, I would think there would certainly be that potential that that could be brought up.

Q. You knew that--and I am not coming down on you with this question. I am just relying on the information that you have. You understood--well it is already in the record regarding the representation of people's activities of one another--and what you learned from Darrel Longest and David Gavin was they did not want a grand jury presentation in this case; am I correct?

* * * * * * *

THE WITNESS: They called and said that they would waive presentation of a grand jury. Why, I don't know.

* * * * * * *

Q. Now you began to develop--you had various concerns at that point in time you had--overall before the case left your office and another state's attorney's office took it, you were involved with the potential ethical conduct of Mr. Gavin and Mr. Longest; am I correct?

A. Yes.

Q. You were concerned about not just ethical conduct, but I think the proper way of asking is that is unethical conduct of Mr. Gavin and Mr. Longest?

A. Concerned--I was concerned whether there was potential criminal charges, potential conflicts of interest

* * * * * * *

Q. Now didn't you also have concerns that Longest and Gavin may know something about the location of the second gun in the case?

Specifically the one that was found underneath Mr. Warner's body?

* * * * * *

THE WITNESS: That they may have some knowledge about that gun?

BY MR. FINDLING:

Q. How that gun got underneath Mr. Warner's body?

A. Yes.

* * * * * *

Q. You had information through sources, but specifically Mr. Leopold, that Darrel Longest may have obstructed justice; am I correct?

A. I thought it was something that had to be looked at.

Q. Okay. One of the specific things was that on his leadership there was an attempt to keep or put Ms. Rubin in a hospital under a false name; am I correct?

A. Yes.

Q. This leadership role that he took had you to believe that Mr. Longest may have had some type of criminal involvement in this case; am I correct?

A. Again, I thought it was something that needed to be investigated further.

Q. As well as all of the other forensic and evidentiary concerns that you went over during direct examination, you were concerned with Mr. Longest's potential criminal activity on that evening?

A. Right.

* * * * * *

Q. And when you indicated that you had a concern about Darrel Longest's representation, as a prosecutor, you had a concern about

> defense attorneys having conflicts in cases; am I right?
>
> A. Well, it can potentially impact on the prosecution.
>
> * * * * * *
>
> Q. You also have concern about the potential reversal of a case down the road?
>
> A. Sure.
>
> * * * * * *

B) Also introduced at the post-conviction hearing was a 20-page letter that Longest and Gavin wrote to the Maryland Attorney Grievance Commission in February, 1991--some 3 months after the Rubin trial ended--in defense of the $150,000 fee they eventually took for their representation, after Rubin sought its return. The following are excerpts from the letter:[8]

> It is obvious that Barry Helfand knew his retainer was going to include Alan Goldstein, Longest and Gavin and himself, or else it would not have come to us without a dollar figure included. It is also apparent that we [Longest and Gavin] were to continue as counsel to her and go see her in jail because the Retainer Agreement was given to *us* to have signed and fill in the blanks.
>
> * * * * * *
>
> The true point in fact is that Ms. Rubin, at first, *did not want* Mr. Helfand to represent her, but wanted Longest and Gavin to do so.
>
> * * * * * *
>
> .... in the week of the trial the client came to *our* offices (Longest and Gavin) and, in the presence of several witnesses, said she was being told by her attorney, Fred Joseph ... that

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[8] Emphasis is in the original unless otherwise noted.

her only chance for a reduced verdict was to say she recalled shooting her husband, and all the details about *how* she did so ... This is very strong evidence that she continued to seek out the legal advice of Longest and Gavin through the last day of trial. (Emphasis supplied)

Point in fact was that it was Mr. Gavin and Mr. Longest who convinced Lisa Rubin to agree to her representation by Helfand (and Goldstein) and it was clearly conditioned by her on the fact that Longest and Gavin be part of the defense team from start to finish. (Emphasis supplied)

* * * * * *

Mr. Pavsner asserts that "We are aware that Longest & Gavin spent a considerable amount of time with Ms. Rubin and on her behalf."

In fact, that statement is a significant understatement. Up until the trial began, we spent *by far* the most time with Lisa in trial preparation, in investigation in the field, in consultation with Mr. Roby, (the private investigator) and in talking to psychologists and psychiatrists who were evaluating her, in legal research, and in keeping her relationship with Parole and Probation good, as a condition of her bond.

* * * * * *

We agreed that, while we may not be lead counsel, we could clearly play a substantial role in the representation and that this was absolutely the desire of the client. It was also Helfand's desire, as his relationship with Lisa was shaky, at best, that we be the "point men" with Lisa, because he did not want to have much contact with her.

* * * * * *

The Work Done

Longest & Gavin knew at the time of our discussion with Lisa and after our discussion with Barry Helfand that day, (May 3, 1990) that we would be working on her case (criminal) and that we would also have all her civil work responsibilities. Nothing changed Longest & Gavin's opinion of what was happening for several months. Longest & Gavin prepared memos, hired and worked with the experts and the private investigator, James Roby, spoke with Lisa and her doctors. Nearly each day we reviewed for hours with her, her memory of the events that day and before. We prepared the draft of the Bond Review Motion for Barry and Alan. We prepared memos on privilege, we worked on and interviewed fact witnesses. We met with her almost daily at the jail and took countless hours of collect phone calls at work and home, day and night, from the day she was incarcerated until the Bond Hearing. We met with the lawyers and with the investigator, James Roby, we were able to establish that the murder of Tim Warner could not have occurred as the police believed that it, in fact, had. Longest & Gavin hired a forensic expert from Texas to review the autopsy (and arranged for a delay in release of the body until he could fly here and do so) and reviewed with him on several occasions his opinion on the cause and time of death. We worked with a specialist (Admiral Davies, U.S.N., Ret.) in the field of photography to analyze a photograph that had been taken of the victim at the crime scene by Robert Miller. We spent days preparing for and recreating the crime scene so that a photo could be taken on a day when the sun would be in the exact same position as it was on the day of the shooting. We worked with Admiral Davies, an expert in recreating and ascertaining times photographs were taken, in doing this. This process uses the placement of the sun, cloud conditions, etc. We were able to establish that the representations of the private investigator (Robert Miller) as to the time that the picture was taken were not consistent with the position of the sun, cloud cover, trees, etc. on that day. No other members of the defense team did this or attended the field experiments.

Between April, 1990 and August, 1990, Longest & Gavin was devoting in excess of 60% of its total firm time and resources exclusively to the Lisa Rubin matters. Other work was turned away, business opportunities were lost, and Lisa was a constant fixture in our office after her release on bond on about June 1, 1990. (She complained that Fred, Barry and Alan were not seeing her enough, not working on the case, and that we were the only ones working on it.) She constantly reviewed with us anything that anyone else told her, including her other attorneys. And this virtual daily contact and relationship with the office continued through the trial and her conviction. Mr. Gavin attended all of her probation appointments which were nearly every other Thursday until trial in November. (Barry, Fred and Alan did not attend at all because they did not want this daily contact with her.)

At the onset of the situation concerning the probation appointments and knowing that whatever part Longest & Gavin played seemed to be an irritant to the prosecutors, Lisa contacted Fred Joseph and asked if he thought that Mr. Gavin's going with Ms. Rubin at her request to these appointments would become known to the prosecutor and cause any further irritating factors. Longest and Gavin was even told by Fred Joseph to go and it would not so irritate the scene, so Mr. Gavin accompanied Ms. Rubin every other Thursday from approximately 10:00 a.m. to 1:00 p.m. (sometimes earlier and sometimes later). During each day of her trial, Ms. Rubin would come to the office of Longest & Gavin and leave her car. Our secretaries would drive her over to the Court and then pick her up for lunch and take her back and usually pick her up at the end of the day. We discussed daily what was happening in her trial and gave her advice as requested on what was happening, as well as answering her questions about the process, which she clearly did not seem to understand. During the majority of the trial, Longest & Gavin stayed away from the Courthouse to avoid irritating the situation.

We spent so much time with her that she used one of beepers to stay in touch, and she used one of our offices for her business affairs, and our staff took messages for her at our office.

* * * * * *

We also talked about the fact that unless Longest and Gavin were involved in the representation of Lisa Rubin, a significant problem concerning privilege and what she said to them may occur at a later time. We do not really know who suggested it, but somebody at the table suggested that between the lawsuits

> that were imminent from her deceased husband's family (their attorneys had already contacted Longest and Gavin about claims against Lisa for her husband's wrongful death and at that time what we believed would be litigation against Lisa Rubin by Steven Pavsner ..., representing her mother (attempting to get her to sign over her interest in a million dollar piece of property) and the managing of her business affairs ... someone suggested that there was a whole lot of civil and criminal work, that if we could honestly say that we were doing that, then just about anything she said to us about anything would be covered by the privilege.[9]

C) Longest's testimony at the post-conviction hearing essentially confirmed the statements of the February, 1991 letter:

> Q. And as well as the firm of Longest and Gavin's name wasn't on there [the Retainer Agreement], but it was still understood that Longest and Gavin would be serving as counsel in the case?
>
> A. Absolutely.
>
> * * * * * *
>
> Q. And one of the areas you researched the most was the issue of privilege; am I correct?
>
> A. Yes.
>
> Q. You provided detailed memorandums of law to the defense team with regard to the attorney-client privilege issue?
>
> A. I think you would call them exhaustive.

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[9] This last passage is taken out of the sequence in which it appears in the letter. Longest and Gavin, it may be noted, prevailed in the fee dispute and apparently remitted nothing to Rubin.

* * * * * *

> Q. Now you, even as close to the trial as two weeks beforehand, had a meeting with all of co-counsel--Mr. Joseph, Mr. Goldstein, Mr. Helfand, Mr. Gavin and yourself to discuss possible defense strategies, am I correct?
>
> A. It was sometime shortly before trial, yes ... certainly within a few weeks.

* * * * * *

Longest also acknowledged his awareness of his own potential exposure to criminal prosecution during his representation of Rubin:

> Q. ... And how come [the meeting of the Rubin defense team] was done at Mr. Kemp's office?
>
> A. I am not quite sure how that all came about. There had been an earlier inquiry that had caused Mr. Kemp to become involved in representing myself, and he simply offered to have the meeting, and it was convenient to everybody, and that is where it occurred.
>
> Q. ... What was the matter in which the inquiry was made of you that you needed Mr. Kemp's assistance?
>
> A. Well, there was a question raised as to whether or not Mr. Gavin or myself had handled evidence or the property that was received from Ms. Rubin in an appropriate fashion. And that involved a discussion or presentation before the grand jury, and I felt it appropriate to have representation at that time, and Mr. Kemp represented me, and ... that was the reason for his involvement.

* * * * * *

> Q. Nevertheless Mr. Kemp was serving in the capacity of representing you and Mr. Gavin at that time?

A. I don't know that he represented Mr. Gavin. I think Mr. Gavin had separate counsel to the best of my recollection, but I just do not recall.

* * * * * *

Q. Well with regard to any conflict that you had in continuing to represent Ms. Rubin, there was no request that she sign off on any waiver of conflict?

A. As I said before, and I wasn't trying to be careful with my words, I said there was a potential for a perceived or apparent conflict of interest. I don't believe there was one. In fact, the client certainly did not want Mr. Gavin or myself away from her side during the course of these proceedings.

Q. So in your opinion, you did not believe that you had a conflict with regard to the representation of Ms. Rubin?

A. I didn't agree--I did not believe there was a conflict at all associated with what we agreed with her that we would do vis-a-vis the preparation for the trial.

Q. Okay. So you did not perceive a conflict with regard to representing her pursuant to the contract that was executed by Mr. Helfand and Ms. Rubin?

A. No. The appearance of a conflict that I am talking about is the fact that Mr. Gavin and Mr.--and myself were called to a place that was apparently near or at the scene of the homicide and potentially became--became potential witnesses with regard to some portions of what occurred after the homicide.

* * * * * *

Q. Okay. And with all these thoughts in mind, you did not have the client waive any conflict that existed in writing regarding your representation of her in this case with all those preexisting conflicts that you had; and I correct?

A. I am not aware of any written waiver, no.

Q. You never came to the Court's attention or had co-counsel--Mr. Helfand, Mr. Joseph, or Mr. Goldstein--that you know of bring it to the Court's attention that our co-counsel who are not seated with us have a conflict with our client, Ms. Rubin; is that correct?

A. I wasn't in the courtroom at any time with them, so I don't know what they represented to the Court.

Q. To your knowledge did they ever represent that to the Court either informally or formally?

A. I have no personal knowledge of it.

Q. Now you had retained counsel because of a grand jury investigation. Do you know the subject matter of the grand jury investigation?

A. It had to do with the handling of evidence.

Q. Okay. And would you agree with me that it had to do with the allegation of obstruction of justice?

A. Well, it is what it boils down to, yes.

* * * * * *

Q. And with that in mind, you never filed any formal pleading or requested trial counsel who you were covered under a contract with to file any formal pleading with the Court acknowledging that one of the witnesses in the case had a conflict and was also representing Ms. Rubin--namely, yourself; am I correct?

A. No, I think you are wrong because I recall a hearing in the chambers of Judge J. James McKenna in which those--if not all, at least some of those issues were discussed.

* * * * * *

Q. Mr. Longest, would you elaborate on the hearing that was--or at least the matter that was brought before Judge McKenna that you referred to just a few moments ago?

A. There had been a meeting in the office of the State's Attorney in this courthouse at which I think Mr. Sonner was present. Mr. Campbell was present, and I believe Tom Tamm was there. If I am not mistaken, I think Barry Helfand was there, Mr. Gavin, and myself were. There was a discussion about whether or not Mr. Gavin and I could enter our appearance or keep our appearance--I don't know if it had already been entered--but keep our appearance in this case.

And it was the position of the State's Attorney's Office that we should not, and that was followed up with a conference for that purpose to explain why we were not going to have our appearance in the case with Judge McKenna.

* * * * * *

And we told Judge McKenna what had occurred, not specifically what had given rise to the potential for a conflict, *but that one was potentially there*, and that we were going to withdraw our appearance from the case or not enter it, whichever the case might have been. (Emphasis supplied)

I think it had already been entered a day or two before this conference or perhaps the same day. I don't remember--and explained why there was going to be a withdrawal, and counsel--other counsels' appearance was going to be substituted, and that is how it came about.

* * * * * *

> Q. Okay. And Ms. Rubin was not at that meeting with Judge McKenna; am I correct?
> A. No. She was not.

* * * * * *

> Q. You at no time, at no time went to Barry Helfand, your friend, your business partner, and said, Mr. Helfand, I will fall on my sword. I will take an allegation of obstruction of justice because that is in the best interest of Lisa Rubin, our client. You never did that, did you?
> A. I had no reason to do that.
> Q. No. What you did was you, while you served as her co-counsel, insulated yourself from criminal prosecution by formally retaining your own attorney in the case of State of Maryland versus Lisa Rubin. Did you not do that?
> A. I didn't do that.

Paul Kemp provided his own recollection of his representation of Longest during the Rubin proceeding:

> Q. Did there come a time in 1990 that you represented, formally, Darryl [sic] Longest?
> A. I did. In 1990 and then for at least half of 1991. Yes.
> Q. All right. Would that have been in connection with the matter of State of Maryland vs. Lisa Joyce Rubin and his activities specifically on or about two days, April 24th, 1990 and April 25th, 1990, before she surrendered?
> A. Yes. I don't know the day of the shooting. It would have been the evening of the shooting, very definitely, into the early morning hours, the next day and the day after that. So, the activities about which Mr. Longest and Mr. Gavin were investigated--and I represented only Mr. Longest--was technically three dates, three

calendar days.

Q. Did you representation involve the possible claim by prosecuting officials that Mr. Longest may have, in some respects, obstructed justice in connection with the investigation of the case of Lisa Rubin?

A. Yes. It did.

Q. Now, the trial on this case occurred in November of 1990, the murder trial.

A. ... Yes.

Q. Were you still representing him at that time, Mr. Longest?

A. Yes.

Q. Was an investigation still pending against Mr. Longest at that time?

A. Oh, yes. Very definitely.

Q. Did there come a time in 1991 that you represented Mr.--that you, as the attorney for Mr. Longest, appeared with Mr. Longest for a grand jury appearance in this county?

A. Yes, sir.

Q. Do you have the date of that?

A. Yes ... The date I have for Longest and Gavin grand jury appearance, first, is May 9th, 1991. The second one is the following Thursday, and that would have been May 16th.

* * * * * *

Q. So, can you tell the Court whether or not both up and including the trial and into May of 1991 an active investigation was still pending against Mr. Longest for his possible obstruction of justice in regards to activities of April 24th and 25th, 1990, if the murder occurred on the evening of April 24th?

A. Yes. It persisted at least through May 16th of 1991. And on that date, we were informed by

> Mark Foley, who was the specially appointed Assistant State's Attorney, that the grand jury had elected not to charge them.

D) The Court of Special Appeals took particular note of Longest, Gavin, and Helfand's testimony at the post-conviction hearing regarding their respective roles as co-counsel:

> (1) *Gavin*:
>
> Q. Were you privy to the trial strategy meetings that those three individuals that you have named, Helfand, Joseph and Goldstein--were you involved in the trial planning strategy sessions?
>
> A. No.
>
> Q. Did you attend the trial in any way?
>
> A. No, Sir.
>
> (2) *Longest*:
>
> Q. Now you indicated in your direct examination, Mr. Longest, that you had your job carved out for you in connection with this representation of Lisa Rubin. A fee was agreed upon, and you did your job; is that correct?
>
> A. Yes.
>
> Q. Barry Helfand, Al Goldstein, and Fred Joseph had their job?
>
> A. That is correct.
>
> Q. Is that fair to say? Were they acting independent of you as it relates to the defense of this case in court?
>
> A. Sure.
>
> Q. Did you exercise any veto power over the tactical, legal, factual, or whatever kind of decision that they made between themselves--the three attorneys whose appearance was in this case?
>
> A. Never.
>
> Q. Would it be fair to say that you acted as a

> supplement in the behind-the-scenes preparation of this case?
> A. Very much so.
> Q. Do you know for a fact what use or in what way the information you brought to Mr. Helfand, Mr. Joseph, and Mr. Goldstein--how your information, how our input was integrated into their defense preparation?
> A. No, never participated even in those defense preparation conferences.
> (3) *Helfand*:
> Q. At any point was trial strategy or was an investigative tactic dictated by Darrel Longest and David Gavin?
> A. Oh, no come on. A trial strategy?

V.

In its second opinion on appeal from the post-conviction court's order granting Rubin a new trial, the Court of Special Appeals cited *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), as precedent for analyzing an attorney conflict of interest case. While the court concluded that the post-conviction judge had not erred in finding that Longest and Gavin continued to serve "as counsel on ... behalf" of Rubin through trial,[10] it determined that they "were not responsible for deciding upon or for carrying out Rubin's trial strategy. They did not enter their appearance to represent [Rubin] at trial." *Rubin*, slip. op. at 6-7. Rubin, the court pointed out, had hired "three outstanding attorneys" as her defense team to represent her at trial and, "[a]lthough

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[10] This was the concession the Court of Special Appeals made in its second opinion after finding in its first opinion that Longest and Gavin's representation terminated on April 25, 1990, the day following the homicide.

Longest and Gavin had some association with [her] case after April 25, 1990, their 'contribution' consisted of what is most accurately described as 'paralegal/investigative' work that was of dubious assistance to the defense and 'client relations' that had nothing to do with trial strategy." *Id.* at 7. Longest and Gavin, said the court, performed only "behind the scenes efforts," which "had no impact whatsoever on the defense team's trial strategy." *Id.*

The court therefore rejected the post-conviction hearing judge's conclusion that Longest and Gavin were in a conflict of interest situation for effective assistance purposes:

> (1) [I]n light of Longest's testimony at the suppression hearing,[11] the choice to refrain from presenting either Longest or Gavin to the jury was a strategic decision well within the range of reasonable competence; and
>
> (2) [T]he choice to offer testimony was neither Longest's or Gavin's to make. Neither rendered "ineffective assistance" because they

---

[11] As to Longest's testimony at the suppression hearing, the Court of Special Appeals stated:

> The Court of Appeals noted that, at the suppression hearing, Longest testified that neither he nor Gavin had suggested registering Mrs. Rubin under a false name but that the decision to use a false name was made by Miller at the hospital. 325 Md. at 564 n. 3, 602 A.2d 677.

Rubin, slip. op at 10 n. 2.

The Court of Appeals footnote referred to states:

> At the suppression hearing Longest testified that he first learned from Miller that the decision had been made at the hospital to register Rubin under a false name. 325 Md. at 564 n. 3, 602 A.2d 677.

However, the *text* in the Court of Appeals Opinion to which that footnote refers in fact finds just the opposite, to wit:

> Longest further instructed Miller and Leopold to take Rubin to the hospital, get her admitted, and to use an alias. 325 Md. at 564, 602 A.2d 677.

> did not testify at trial about their dealings with ... [Rubin] on April 24 and 25.

Id. at 8. Accordingly the court held "as a matter of law that, unless counsel could have prevented the happening of the deficient act, he or she cannot have rendered ineffective assistance." *Id.*

Finding no actual conflict, the court did not address the issue of whether Longest and Gavin's representation of Rubin might have been adversely affected. Neither did it address the possible conflict posed by the criminal investigation that Longest and Gavin themselves continuously labored under while representing Rubin.

VI.

Rubin makes three claims of constitutional error on the part of the Maryland appeals court:

1) That it unreasonably applied clearly established Supreme Court precedent when it failed to recognize her right to conflict-free counsel during the pre- trial stages of her case, *i.e.* on April 24-25, 1990;

2) That it unreasonably applied that precedent when it failed to recognize her right to conflict-free counsel even if, as of the time of trial, counsel were functioning only in a paralegal/investigative capacity as opposed to serving as trial counsel; and

3) That its decision that Longest and Gavin acted in a merely "paralegal/investigative" capacity was based on an unreasonable determination of the facts in light of the evidence presented in the post-conviction state court proceeding. 28 U.S.C. § 2254(d)(2), and that those facts, while presumed to be correct, are overcome by clear and convincing record evidence. 28 U.S.C. § 2254(e)(1).

VII.

A) Since this case was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, the Court applies 28 U.S.C. § 2254 as amended by AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997):

> The statute reads in pertinent part:
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; .... or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Supreme Court elaborated upon the meaning of the statute's key clauses:

> As for the "contrary to" clause:
>
> A state court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases .... A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this court

> and nevertheless arrives at a result different from our precedent.

529 U.S. at 405-06, 120 S.Ct. 1495.

As for the "unreasonable application" clause:

> ... a state court decision can involve an "unreasonable application" of this Court's clearly established precedent in two ways. First, a state court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407, 120 S.Ct. 1495.

The Court went on:

> Stated simply, a federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.

Id. at 409, 120 S.Ct. 1495.

> For purposes of today's opinion, the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law.

Id. at 410, 120 S.Ct. 1495.

* * * * * *

> Congress specifically used the word "unreasonable," and not a term like "erroneous"

> or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 411, 120 S.Ct. 1495.

B) The right to the effective assistance of counsel under the Sixth Amendment includes the right to representation free of conflicts of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333; *see also United States v. Tatum*, 943 F.2d 370, 375 (4th Cir.1991). To establish ineffective assistance in a conflict of interest situation, a defendant who raised no objection at trial must establish (1) that her attorney labored under an actual conflict of interest and (2) that counsel's representation was adversely affected by the actual conflict. *Cuyler*, 446 U.S. at 348, 100 S.Ct. 1708. If these two conditions are met, prejudice will be presumed; a defendant is not required to show that the conflict altered the outcome of the proceeding. *Id.* at 349-50, 100 S.Ct. 1708.

The Fourth Circuit has held that:

> To establish an actual conflict of interest, the petitioner must show that his interests "diverged with respect to a material factual or legal issue or to a course of action."

Williams v. French, 146 F.3d 203, 212 (4th Cir.1998) (quoting *Cuyler*, 446 U.S. at 356 n. 3, 100 S.Ct. 1708). Actual conflicts can arise at pre-trial stages as well as at trial. *Holloway v. Arkansas*, 435 U.S. 475, 489-90, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Burket v. Angelone*, 208 F.3d 172, 185 (4th Cir.2000); *United States v. Magini*, 973 F.2d 261 (4th Cir.1992); *United States v. Tatum*, 943 F.2d at 376 (4th Cir.1991). An attorney's interests may diverge from those of his client at that stage in a number of ways. He may fail to investigate or pursue a line of defense or seek a plea agreement because of a duty owed to a second client. *Id.* He may counsel a plea to protect a fee. *Magini*, 973 F.2d 261. Or he may become so "entangled" in the criminal activity that is the subject of the client's suit that he fails to act in the client's interest in order to protect his own. *Reckmeyer v. United States,* 709 F.Supp. 680, 688-89 (E.D.Va.1989). As suggested by all these cases, the inquiry as far as pre-trial counsel is concerned is essentially no different from that for trial counsel: Did counsel operate under an actual conflict? Did that conflict adversely affect the attorney's representation?

VIII.

A) There is no question that the Court of Special Appeals glossed over the issue of Rubin's entitlement to conflict-free counsel during the stages prior to trial. In a footnote to its opinion, the court recognized that "(r)epresentation rendered before trial can be ineffective," *Rubin*, slip. op. (7/28/98) at 6 n. 1, citing, for example, an attorney's failure to pursue a plea bargain on account of a conflict of interest. But, the court went on to say, "the hearing judge did not find that ineffective assistance occurred before trial." *Id.* Hence it inquired no further.

This characterization of the post-conviction court's finding by the intermediate appeals court is puzzling, to say the least.

Quite clearly, the post-conviction court found an actual conflict on the part of Longest and Gavin in the pre-trial stages:

> The conflict between Longest, Gavin and Petitioner is that in order to fully represent their client, the interests of their client must come before their interests. Longest and Gavin put their interest in collecting a fee and insulating themselves from potential criminal changes before the interests of Petitioner.

State v. Rubin, Crim. No. 59303, slip op. at 8 (Cir Ct. for Montgomery County, Md., Mar. 3, 1997). He further found, by implication if not explicitly, that this conflict had a *continuously* adverse effect on their representation of Rubin. Every one of the actions Longest and Gavin took--from remaining in the case, to attempting to waive a preliminary hearing and grand jury indictment, to investigating leads, to preparing witnesses, to preparing memoranda on the privilege issue, and finally to not testifying at trial--was tainted by their conflict. Necessarily, then, the post-conviction hearing judge found that Longest and Gavin rendered ineffective assistance at both the pre-trial and trial stages.

The Court of Special Appeals, it should be emphasized, left wholly intact the finding of the post-conviction hearing judge with regard to Longest and Gavin's activities on the night of the homicide. They arrived at the scene of the crime and:

1) removed, if not tampered with evidence;

2) directed Rubin to leave the scene;

3) directed the private investigators to place Rubin in the hospital under an alias;

4) after calling the police, denied to them that they represented Rubin; and

5) failed to present Rubin to the police for nearly 24 hours, after escorting her to her bank in order to have her withdraw $105,000 to pay their retainer.

But if this was true, it is patently clear that by their actions Longest and Gavin immediately became fact witnesses not only as to the scene of the crime but as to their client's actions in the 24 hours immediately following. They counseled actions that, if not explained, might (in fact did) lead the prosecution at trial to argue that Rubin acted with premeditation and that her flight evidenced consciousness of guilt. Testimony by either of the attorneys at trial was available to dispel those notions. At the same time, Longest and Gavin immediately exposed themselves to (and in fact immediately, up to, through, and after trial were investigated by the grand jury for) possible obstruction of justice and hindering the apprehension of a criminal defendant, if not criminal conspiracy. By the time of trial, Longest for certain and possibly Gavin had engaged attorneys to represent them in that regard. In consequence, they became hopelessly "entangled in the conduct charged against the client." *Reckmeyer*, 709 F.Supp. at 688; *see also Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir.1984) (actual conflict found where counsel had personal interest in avoiding potential criminal and disciplinary charges for destroying evidence in client's case). In addition, their interest in securing a healthy retainer caused them to counsel Rubin to act in unnecessarily suspicious fashion when they caused her to delay her surrender to the police for 24 hours. *Cf. Magini*, 973 F.2d 261 (case remanded for evidentiary hearing to determine whether attorney's interest in protecting fee caused him to counsel unfavorable plea). It was objectively unreasonable for the Court of Special Appeals to conclude other than that Longest and Gavin's personal interests conflicted with objectives of their representation of Rubin counting almost from the moment they arrived at the scene of the crime.

The Court, moreover, finds that Longest and Gavin's actions in the days following their appearance on the scene of the homicide, even before they associated with Barry Helfand et al., adversely affected both their own and eventually Helfand's performance, an issue the Court of Special Appeals never reached.

On April 27, 1990, three days after the homicide, Longest and Gavin--and they alone--entered an appearance on behalf of Rubin in the District Court for Montgomery County and waived a preliminary hearing. Although a preliminary hearing is not a forum for discovery, *see Timbers v. State*, 2 Md.App. 672, 236 A.2d 756 (1968), the fact is that at least some witnesses may be called by the State and, if called, may be cross-examined. *See Kardy v. Shook*, 237 Md. 524, 207 A.2d 83 (1965). While a preliminary hearing is sometimes said to be of limited utility and is often waived, in this case it is quite as reasonable to infer that, by waiving the hearing, Longest and Gavin were attempting to divert the spotlight from their own conflict and the possibility that their disqualification from case would be immediately sought. Longest and Gavin's effort to divert attention from their own conflict is similarly evidenced by their request to Assistant State's Attorney Tamm to forego an indictment against Rubin and proceed on the basis of an information (*see* testimony of Tamm at text at p. 855, *supra*). The grand jury, as it turned out did indict Rubin, but for present purposes the point is that Longest and Gavin tried to get the State to waive presentment, not that they succeeded or failed in having that happen.

The adverse effect of their conflict on their representation of Rubin did not abate when, within a week of the crime, Longest and Gavin advised her to engage Helfand as trial counsel. Longest and Gavin remained in the case as co-counsel (their fee was $150,000, Helfand et al.'s was $100,000), wrapping themselves in the attorney-client privilege and thereby assuring that they would never be asked to testify at trial. If they did not help craft it, at the very least they acquiesced in the attorney-client privilege as the foundation of the defense case, a device perhaps for attempting to block any testimony by the private investigators who were with Longest and Gavin at the scene of the crime, but at the same time one that virtually sealed off access to any testimony from the two of them.

Nothing in the record suggests that Rubin understood, much less intelligently waived, the continuing conflict that this defense strategy incorporated. Longest and Gavin's statements in their letter of February, 1991 indicate just how much Rubin was misled in this regard, a consideration that the Court of Special Appeals also failed to address. In explaining to Rubin why they needed to stay in the case, Longest and Gavin mentioned only the possibility of future civil litigation against Rubin and that, if they remained, Rubin could say "just about anything ... to us about anything" and "be covered by the privilege." Nothing in the letter, nor indeed anything said at the post- conviction hearing, suggested that Rubin was ever told that having Longest and Gavin step out of the case might be to her benefit, that it might help explain to the jury why she acted as she did following the homicide. Nowhere did Longest and Gavin reveal to Rubin that their remaining in the case would serve their own interest in avoiding disclosure of potentially criminal actions that they themselves had taken.[12] Indeed, one of the more disturbing statements that appears in the Longest/Gavin letter is that "they prepared memos on privilege." While those memos are not in evidence, one can only suppose that they too were devoid of any reference to the possible benefits Rubin might gain by waiving her privilege and calling Longest and Gavin as witnesses in the case.[13]

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[12] One statement in the Longest/Gavin letter of February 21, 1991, distinctly untrue and supported by no evidence whatsoever, is that they acted in an ethically correct manner with full disclosure to the client. This they did not do. Rule of Professional Conduct 1.7, dealing with conflict of interest, provides:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited ... by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation;
> (c) The consultation required by ... (b) shall include explanation of the implications of ... any limitations resulting ... from the lawyer's own interests, as well as the advantages and risks involved.

Longest and Gavin never consulted with Rubin within the terms of the rule because they never explained to her the implications of any limitations resulting from their own interests, or the advantages or risks involved. Consequently Rubin never consented to her representation by Longest and Gavin "after consultation."

Additionally, nothing in the record indicates that Helfand et al. ever advised Rubin of the conflicts Longest and Gavin actually faced or that they obtained a waiver from her to keep Longest and Gavin in the case notwithstanding their conflict.

Since the Court of Special Appeals failed to make factual findings regarding the existence *vel non* of an actual conflict of interest on the part of Longest and Gavin at the pre-trial stage, it remains for this Court to do so. Joining the post-conviction hearing judge in his conclusion, the Court finds that Longest and Gavin did in fact labor under an actual conflict during that phase. The Court further finds that this conflict adversely affected their representation. The failure of the Maryland Court of Special Appeals to make these findings was not merely erroneous or incorrect. It was an objectively unreasonable application of clearly established Supreme Court precedent regarding Rubin's right to conflict-free counsel.

B) Rubin next argues that even if, as the Court of Special Appeals found, Longest and Gavin played only a "paralegal/investigative" role through trial and did not control trial strategy, the court unreasonably applied clearly established Supreme Court precedent by finding as a matter of law that the attorneys could not have an actual conflict of interest. The Court will discuss presently discuss why, from a factual standpoint, it deems the Court of Special Appeals to have been clearly erroneous and objectively unreasonable in concluding as a matter of fact that Longest and Gavin only played a paralegal/investigative role but, for present purposes, it will be assumed that their role was limited to that.

From a review of the record, especially the extraordinary Longest/Gavin letter of February 21, 1991, it is apparent that, at the very least, Longest and Gavin investigated the case, handled preliminary proceedings, arranged for and prepared witnesses for trial, and prepared legal memoranda, including memoranda on the issue of attorney-client privilege which they submitted to trial counsel Helfand and others. It is indisputable, therefore, that what they did helped to bring trial counsel "up to speed" for purposes of trial. It is likewise certain that even if Helfand, et al. alone made decisions regarding strategy, Longest and Gavin at all times remained part of the defense team. The conflicts that they had created in the first 24 hours after the homicide never disappeared or diminished.

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[13] Insofar as it might be argued that Longest and Gavin received the blessing of Circuit Court Judge McKenna to remain in the case despite their "potential conflict," the judge, it will be remembered, was never told what the conflict was, *supra*, p. 860. In fact it appears that Judge McKenna was never told that Longest and Gavin were going to remain in the case at all, much less to the extent they actually did.

Again, the right to conflict-free counsel is clearly established Supreme Court law. This "generalized standard" is "sufficiently clear for habeas purposes," *Williams*, 529 U.S. at 382, 120 S.Ct. 1495 (Stevens, Souter, Ginsburg and Breyer, JJ., concurring), to apply to co-counsel who, even if not stated at counsel's table, participate in an active way in preparing for trial proceedings, whether drafting legal memoranda or readying witnesses for trial.

In the *Tatum* case, which--one can only express amazement--involved the same David Gavin who the Court finds was conflicted here, the Fourth Circuit discussed the "taint" that a conflicted attorney can have upon trial counsel. Gavin was deemed conflicted there because, among other things, in defending his client for failing to include assets on a bankruptcy schedule, he deflected attention away from his own law firm,[14] which apparently had advised the client to do what he was being prosecuted for. While the Fourth Circuit refers in several places in *Tatum* to the fact that Gavin sat at counsel table with his co-counsel Paul Kemp,[15] Rubin is correct in her argument before this Court that the mere presence of counsel at counsel's table or the fact of "control" of the litigation were not crucial considerations in *Tatum*. What mattered in *Tatum* was the functional role Gavin played *vis-a-vis* Kemp, which was to keep him "up to speed."

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[14] Darrel Longest, whom the Court also finds conflicted here, was identified as a member of Gavin's firm in *Tatum*. It was in part because Longest would have been a witness adverse to Gavin's client there that the Fourth Circuit Court found a conflict to exist.

As Kemp told the trial judge in *Tatum*, Gavin had represented the defendant "throughout the grand jury stages of this case and in various attendant civil matters. He has, at the request of the defendant, been helping ... throughout the presentation for this trial which ... is very complicated and he has been assisting me to try and bring me up to speed in the investigation ... I would at least like him available to assist me insofar as pointing out details that may come up ...."

At which point the trial court observed:

> Well, I gather from what Mr. Kemp said that Mr. Gavin is going to be more in a consultative stance than in a participatory stance.
>
> Mr. Kemp: That is correct, Your Honor.

Tatum, 943 F.2d at 378.

The Fourth Circuit elaborated on Gavin's role: "Kemp depended on Gavin to brief him on both the facts and the prior proceedings .... Gavin was an acknowledged source of information to Kemp .... [T]he presentation of Tatum's defense was the product of both Gavin and Kemp, even though their contributions may have varied in function and degree." *Id.* In consequence, said the court:

> This joint effort by the two, when one was so completely disqualified, caused an unwitting, but disqualifying, taint to the other.

Id.

Whether or not Gavin was present at counsel table,

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[15] The Court notes that Kemp was also the attorney Longest retained when he realized he was under investigation by the grand jury for his conduct in the present case.

"Kemp's knowledge of the case and the avenues for defense depended on Gavin's more complete knowledge." *Id.* It was, therefore, "infected by Gavin's conflicts." *Id.* Among other taints, "it would never occur to Kemp to call Gavin as a witness in an effort to shift ... the blame for the loss of the file containing possibly exculpatory evidence." *Id.*

Were there any doubt about the matter, the *Tatum* court was at pains to emphasize that its decision did not depend on Gavin's trial assistance in representing the client. Noting applicable Supreme Court precedent, the Fourth Circuit held:

> Even if we were to consider only Gavin's direct representation of Tatum, our conclusions in this case would not be different. Before Kemp entered his appearance for Tatum, Gavin's representation resulted in an actual lapse, because he did not think to invite the government to alter the focus of its investigation from Tatum to his law firm as part of a plea bargain. As observed by the Supreme Court in *Holloway*, a conflict of interest has constitutionally detrimental effects before trial, just as during trial, because of what it tends to prevent the attorney from doing.
>
> * * * * * *
>
> We find that Gavin's actual conflicts of interest adversely affected Tatum's defense when he alone was representing Tatum .... While Kemp alone did not represent conflicting interests, his defense of Tatum was tainted by his dependence on Gavin.

Id. at 379 (citation omitted).

The present case replays *Tatum* almost exactly. The same David Gavin, this time joined by his partner Darrel Longest, is under scrutiny for conflict of interest. Here, as in *Tatum*, the attorneys represented their client during the preliminary stages of the case and in attendant civil matters, helped throughout the presentation for trial (at the request of the client), and assisted the trial attorneys by bringing them "up to speed." As the *Tatum* trial judge observed of Gavin, Longest and Gavin in the present case may have been "more in consultative stance than in a participatory stance," but as in *Tatum*, the trial attorneys clearly depended on them to brief them on both the facts and the prior proceedings. As in *Tatum*, the presentation of Rubin's defense was necessarily the product of both Longest/Gavin and Helfand/Goldstein/Joseph, "even though their contributions may have varied in function and degree." *Id.* at 378. Here, in consequence, as in *Tatum*:

> [The] joint effort ... when one [group] was so completely disqualified, caused an unwitting, but disqualifying, taint to the other.

Id.

Finally, considering only Longest and Gavin's "direct representation" of Rubin, the result, just as in *Tatum*, was an "actual lapse" on their part. They never thought to remove themselves from the case altogether so that they might become witnesses on her behalf. They never thought to draw the State's attention to their own actions regarding the handling of evidence at the crime scene or in causing the 24 hour delay in Rubin's surrender.

The question in this case was always premeditation and deliberation, not whether Rubin committed a homicide. The several actions Longest and Gavin directed Rubin to take made the homicide look more premeditated and more deliberate. By failing to draw the spotlight on their own actions, whether for financial reasons (to remain in the case and gain a substantial fee) or out of fear for their own criminal liability, they lapsed in their duty of representation. The holding of the Court of Special Appeals that counsel as deeply conflicted as Longest and Gavin were could remain active in the case so long as they did not sit at counsel table or control trial strategy constitutes a second objectively unreasonable application of clearly established Supreme Court precedent regarding Rubin's right to conflict-free counsel.

C) Rubin's last argument is that the decision of the Court of Special Appeals that Longest and Gavin played only a "paralegal/investigative role" was based on an unreasonable determination of facts in light of the evidence presented in the court proceeding, *see* 28 U.S.C. § 2254(d)(2), in that its factual findings, presumed to be correct, are shown by clear and convincing evidence not to be. *See* 28 U.S.C. § 2254(e)(1).

In determining that Longest and Gavin played that limited role, the appeals court relied on the brief testimony Longest, Gavin and Helfand gave at the post-conviction hearing. Rubin insists that in fact the record evidence overwhelmingly demonstrates that Longest and Gavin's role was far more active.

A court ordinarily "accords great weight to a lawyer's perception of a conflict" when evaluating a conflicts claim. *See United States v. Young*, 644 F.2d 1008, 1014 (4th Cir.1981). *Young*, however, also states that "courts necessarily rely in large measure upon the good faith and good judgment of defense counsel in determining whether an actual conflict of interest exists." *Id.* (citation omitted). In view of the truly remarkable letter that Longest and Gavin wrote to the Maryland Attorney Grievance Commission within 3 months of the conclusion of the Rubin trial, there was and is, objectively speaking, every reason to doubt the good faith of Longest and Gavin's suggestion at the post-conviction hearing 5 years after the trial that their role was secondary and that they labored under no conflict. Their letter sets out in minute detail that Longest and Gavin served Rubin in a "multitude of ways .... even during the trial." The Court need not repeat that "multitude of ways" here.[16] It is enough to conclude that the Court of Special Appeals' minimization of counsel's role was clearly and convincingly unreasonable in light of this evidence.

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[16] *See supra*, pp. 856 - 58.

This, in the Court's judgment, represents a third basis for granting habeas relief in this case.

IX.

Whether, in order to prevail, it suffices for Rubin to show that Longest and Gavin's interests merely diverged from hers with respect to a course of action, *see Williams v. French*, 146 F.3d 203, or whether she must identify a plausible alternative defense strategy or tactic that might have been and was not pursued because of the actual conflict, *see Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir.1999) (*en banc*), the result is the same. Longest and Gavin had a strong personal interest in not giving testimony about what they counseled Rubin to do and what they themselves did on the night of the crime and the day after, which diverged from Rubin's interest in having them testify on her behalf at trial. Under the *Williams* test, that alone suffices. But calling the attorneys as witnesses was unquestionably a plausible alternative defense strategy to not calling them. Moreover, the link between the attorneys' conflict and the defense strategy based on the attorney- client privilege is obvious, whatever argument might be proffered in support of the strategy adopted in the case. This would satisfy the *Freund* test.

Had Longest and Gavin been called to testify, the jury might well have reached a verdict of voluntary manslaughter, involuntary manslaughter, or even an acquittal based on self defense. But the Court is not required to go that far. Once it is established that an attorney labored under an actual conflict of interest that adversely affected his representation, prejudice is presumed; the defendant need not show that the tactic or strategy would have altered the outcome of the proceeding. *See Cuyler*, 446 U.S. at 349-50, 100 S.Ct. 1708. The Court is satisfied that Rubin has carried her burden here.

The Court of Special Appeals, from all appearances, reached a hasty judgment in this case. In its first opinion, issued without a full record and with less than full briefing, it found as a fact that Longest and Gavin ceased their representation of her on April 25, 1990, the day after the homicide. Then, on reconsideration, with a record before it, it was forced to conclude that Longest and Gavin had indeed engaged in "some" representation through trial, but chose to characterize the representation as being of a distinctly secondary nature. The second opinion, however, did little to ameliorate the shortcomings of the first. Objectively unreasonable errors of constitutional dimension remained. Those errors, in the Court's view, fully justify grant of the relief Rubin seeks.

X.

The Court finds that Rubin's Sixth Amendment right to the effective assistance of counsel was denied by reason of conflicts of interest surrounding her attorneys Darrel Longest and David Gavin from the time they arrived on the scene of the crime up to and through the end of Rubin's trial.

APPENDIX D

LISA JOYCE RUBIN * IN THE
* COURT OF APPEALS
v. * OF MARYLAND
* Petition Docket No. 428
STATE OF MARYLAND * September Term, 1998
(No. 38, Sept. Term, 1997,
* Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

Date: Nov 13 1998

APPENDIX E

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

Application for Leave to Appeal

No. 38

September Term, 1997

POST CONVICTION

STATE OF MARYLAND

v.

LISA JOYCE RUBIN

Murphy, C. J.,
Davis,
Harrell,
J.J.

PER CURIAM

Filed: July 28, 1998

On November 6, 1997, we granted the State's application for leave to appeal and vacated a post conviction order by which the Circuit Court for Montgomery County granted a new trial to Lisa Joyce Rubin. Mrs. Rubin's counsel thereafter requested that we reconsider our decision because the record on which it was based did not include transcripts of testimony presented to the judge who presided at the post conviction hearing. As a result of that request, we allowed petitioner's counsel to supplement the record with the transcripts and recalled our earlier opinion. Having reviewed the testimony and argument of counsel, we are persuaded that Mrs. Rubin is not entitled to a new trial.

Mrs. Rubin was convicted by a jury of first degree murder and use of a handgun in the commission of a crime of violence. Those convictions were affirmed by the Court of Appeals in *Rubin v. State*, 325 Md. 552 (1992). On September 29, 1995, Mrs. Rubin filed the instant petition seeking post conviction relief. Art. 27, §§ 645A-645J. On March 3, 1997, the hearing judge vacated her convictions and awarded her a new trial.

The hearing judge was persuaded that Darrel Longest and David Gavin, two attorneys, had rendered her ineffective assistance of counsel because they had neglected their duty to "zealously defend their client." In his statement of reasons for granting relief, the hearing judge set forth the following facts:

> Lisa Rubin (hereinafter "[p]etitioner") and Timothy Warner (hereinafter "Warner") met in the spring of 1979, married in May, 1980 and separated in March of 1990.
>
> Petitioner carried on an affair with William Glisson (hereinafter "Glisson"), while Warner was having an affair with Debra Servin-Leete (hereinafter "Servin- Leete"). After petitioner ended the relationship with Glisson, he came to petitioner's home on one occasion and allegedly grabbed her wrists and

caused permanent nerve damage. Petitioner and warner brought a civil suit against Glisson seeking damages in the Circuit Court for Montgomery County, Maryland. During this trial, someone placed cyanide in a bottle of soda in Glisson's refrigerator. The attempted murder was investigated by the Montgomery County Police Department, but no arrests were made.

After the Glisson trial, petitioner and Warner separated. Petitioner hired Prudential Associates, a private investigative company, to investigate Warner's affair in anticipation of the upcoming divorce. Robert Miller (hereinafter "Miller") was the President of Prudential and Robert Leopold (hereinafter "Leopold") was an investigator with the company.

In April of 1990, petitioner informed Miller that Warner had told her that he was the one who had poisoned Glisson. Miller referred petitioner to Darrel Longest, Esq. (hereinafter "Longest"). Longest was retained and arranged with the Office of the State's Attorney for Montgomery County for petitioner to be granted immunity with regard to any possible charges relating to the Glisson poisoning in exchange for her information.

On April 20, 1990, petitioner and Longest met with Detective Charles Shawen of the Montgomery County Police Department and petitioner related what Warner allegedly had told her about the Glisson poisoning.

On April 23, 1990, petitioner received a telephone call from Warner and they discussed the need to put to sleep their old and infirm dog, Mutley. They agreed to meet at 6:00 p.m. the next evening at the Peachtree Veterinary Clinic in northern Montgomery County.

Petitioner and Warner met at the Peachtree Clinic the next evening. The two decided to take Mutley for a walk in the woods behind the clinic. Petitioner alleges that while they were in the woods, she told Warner that she had gone to the authorities with the information about Glisson's poisoning. Petitioner then alleges that Warner became enraged, produced a gun and pointed it at her. The gun allegedly produced by Warner was a Biretta pistol which petitioner owned but claimed had been stolen out of her house prior to the date of the shooting. Petitioner then pulled from her purse a .38 caliber Smith & Wesson revolver and fired at Warner five times, face on, striking him with four of the shots. Warner was able to move down the path approximately 200 feet, where he fell to the ground. Petitioner reloaded the gun and fired five additional shots into the back of Warner as he lay face down. Petitioner claimed that Warner was moving and still had the gun in his possession and she was afraid he could still fire the weapon. Petitioner then reloaded her gun a third time but did not fire any rounds. Petitioner left Warner in the woods with Mutley still attached to his right wrist. The Biretta was found under Warner's body with a full clip but no bullet in the firing chamber.

Petitioner returned to the veterinary clinic and called Miller. The two arranged to meet at a shopping center approximately 10 miles from the veterinary clinic. Miller arrived with Leopold and Miller spoke privately with petitioner for twenty minutes. Miller directed

Leopold to search petitioner's car for a gun, yet none was found. Petitioner and Miller drove to the scene in Miller's car followed by Leopold in his car.

Petitioner led Miller and Leopold through the woods to Warner's dead body. Miller and Leopold took photographs of the scene and put Mutley in a fenced area behind the clinic. Miller called Longest and told him to come to the clinic. Longest contacted his law partner David Gavin (hereinafter "Gavin") and the two arrived at the clinic at approximately 9:00 p.m. Longest spoke with petitioner while Gavin spoke with Miller and Leopold and then they talked as a group.

Petitioner had apparently taken a large amount of medication, and Longest told Miller and Leopold to take her to a hospital for a possible drug overdose and have her admitted under a false name. Miller and Leopold transported petitioner to Montgomery General Hospital and checked her in under the name Sharon Peterson. [Judge Rodowsky, in his opinion for the Court of Appeals, stated that Mrs. Rubin was "registered" at the hospital but was not admitted for treatment.] Petitioner was discharged at 3:00 a.m. on April 25 and spent the remainder of the night at Miller's house. While petitioner was at the hospital, Longest notified the police that Warner was dead, but did not disclose petitioner's identity, and the crime scene was then processed.

Petitioner spent the rest of April 25 with Longest and Gavin. Gavin drove petitioner to her bank to withdraw $105,000.00 to be used as a retainer fee and to cover expenses. In

> addition, Longest took possession of some of her property, which included a jacket, a purse, .22 caliber bullets and a .38 caliber Smith and Wesson handgun. These items were kept at the law offices of Longest and Gavin. After discussions with the Office of the State's Attorney, during which it was discovered that there was a warrant out for petitioner's arrest, petitioner was turned in to the police that evening at 7:00 p.m.

The right to counsel guaranteed by the Sixth Amendment in criminal cases assures that a defendant will be given the *effective* assistance of counsel. Effectiveness of representation is measured against a standard of reasonable competence. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2064, 80 L.Ed.2d 674 (1984). Representation is ineffective when counsel's performance has "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. To be constitutionally significant, a deficiency in counsel's performance must have a prejudicial effect on the defense of the case. Defining the prejudice required, the Supreme Court has said:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

466 U.S. at 694, 104 S.Ct. at 2068. Under Sixth Amendment jurisprudence, therefore, the effectiveness of counsel is adjudged by (1) the competency of representation and (2) the prejudice that any alleged deficiency caused to the defense.

The effective performance of counsel requires meaningful compliance with the duty of loyalty and the duty to avoid conflicts of interest. The breach of these basic duties can cause representation to be deemed ineffective. More than a *mere possibility* of a conflict, however, must be shown. The Sixth Amendment is implicated only when the representation of counsel is adversely affected by an actual conflict of interest. When counsel for a defendant in a criminal case has an actual conflict of interest in his representation of a defendant and the conflict adversely affects counsel's performance in the defense of the defendant, prejudice to the defense is presumed and a new trial must be ordered. *Cuyler v. Sullivan*, 446 U.S. 335, 348-50, 100 S.Ct. 1708, 1718-19, 64 L.Ed.2d 333 (1980). When such a conflict occurs, no prejudice need be shown because the conflict of interest is assumed to be harmful. As the Supreme Court noted in *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942), "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *See also Holloway v. Arkansas*, 435 U.S. 475, 490-91, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978) (a rule that required a defendant to show that a conflict prejudiced him would not be susceptible to intelligent, even-handed application).

There are at least three ways in which a conflict of interest can develop between an attorney and his or her client. The most obvious conflict exists when an attorney actively represents two co-defendants who have conflicting interests. *Sullivan*, 446 U. S. at 350, 100 S.Ct. at 1719. If an attorney is actively engaged in legal representation that requires him or her to account to two masters, an actual conflict exists when action taken on behalf of one impacted adversely on the other. A conflict also exists when the client's interest conflicts with an interest held by a current or former client. Lastly, a conflict exists between the interest of the client and the attorney's own personal interests.

Even though Longest and Gavin did not attend Mrs. Rubin's trial, the hearing judge found that they nevertheless did represent her in the trial.[1] The basis for that finding was:

> Although Longest and Gavin were not seated at the defense table with Helfand, Joseph and Goldstein during the trial, it is clear that they were in fact hired by Petitioner to serve as counsel on her behalf and participated in her defense. This is evident not only from the testimony of Longest and Gavin at the hearing on this petition but also by the fact that Petitioner unsuccessfully brought proceedings against them in an effort to reclaim the $105,000 fee she had paid them to represent her.

The hearing judge did not err in finding that Longest and Gavin served "as counsel on ... behalf" of Mrs. Rubin. We are persuaded, however, that Longest and Gavin were not responsible for deciding upon or for carrying out Mrs. Rubin's trial strategy. They did not enter their appearance to represent Mrs. Rubin at trial. In fact, Mrs. Rubin hired three outstanding attorneys -- Barry Helfand, Alan Goldstein, and Fred Joseph -- hereinafter referred to as "the defense team," to represent her at the trial. Although Longest and Gavin had some association with Mrs. Rubin's case after April 25, 1990, their "contribution" consisted of what is most accurately described as "paralegal/investigative" work that was of dubious assistance to the defense and "client relations" that had nothing to do with trial strategy. The "behind the scenes" efforts of Longest and Gavin had no impact whatsoever on the defense team's trial strategy.

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[1] Representation rendered before trial can be ineffective. For example, an attorney may, on account of a conflict of interest, either pursue or fail to pursue a plea bargain when the other course of action would have been more appropriate to the defendant client. In this case, however, the hearing judge did not find that the ineffective assistance occurred before trial.

The hearing judge concluded that the interest of Longest and Gavin was in conflict with the interest of Mrs. Rubin and, on account of that conflict, they harmed her defense. The hearing judge found that "due to their involvement with [her] on April 24 and 25, Longest and Gavin faced the possibility of criminal charges for obstruction of justice and hindering the apprehension of a criminal." The two attorneys manifested the conflict, the hearing judge ruled, by failing to present testimony at Mrs. Rubin's trial on the following matters:

1. They presented no testimony to explain "what occurred" when they visited the crime scene with Mrs. Rubin on the night of the homicide.
2. They did not testify that they had suggested that she use a false name when she applied for admission to the hospital.
3. They did not offer testimony to explain why Mrs. Rubin waited until 7:00 p.m. to turn herself in to the police.

The hearing judge concluded that Longest and Gavin should have testified at trial and explained to the jury that Mrs. Rubin was "simply following the advise of her attorneys" and "the events were [not] part of a premeditated grand plan or scheme" to elude the police. There are two reasons why that conclusion is incorrect: (1) in light of Longest's testimony at the suppression hearing, the choice to refrain from presenting either Longest or Gavin to the jury was a strategic decision well within the range of reasonable competence; and (2) the choice to offer testimony was neither Longest's nor Gavin's to make. Neither rendered "ineffective assistance" because they did not testify at trial about their dealings with Mrs. Rubin on April 24 and 25.

In any case where an "ineffective assistance" claim is asserted against a lawyer who was not present with the defendant at trial, the party alleging ineffective assistance must establish that the lawyer in question had at least some responsibility for deciding upon the alleged deficiency, by advising, etc. the lawyer or lawyers who were in the courtroom. A counsel who "represents" an accused renders "ineffective assistance" only where he or she is in a position to take the action or inaction that constitutes the deficiency. We hold as a matter of law that, unless counsel could have prevented the happening of the deficient act, he or she cannot have rendered ineffective assistance.

The following transpired during Gavin's testimony:

> Q. Were you privy to the trial strategy meetings that those three individuals that you have named, Helfand, Joseph and Goldstein -- were you involved in the trial planning strategy sessions?
>
> A. No.
>
> Q. Did you attend the trial in any way?
>
> A. No, Sir.

The following transpired during Longest's testimony:

> Q. Now you indicated in your direct examination, Mr. Longest, that you had your job carved out for you in connection with this representation of Lisa Rubin. A fee was agreed upon, and you did your job; is that correct?
>
> A. Yes.
>
> Q. Barry Helfand, Al Goldstein, and Fred Joseph had their job?
>
> A. That is correct.
>
> Q. Is that fair to say? Were they acting independent of you as it relates to the defense of this case in court?
>
> A. Sure.
>
> Q. Did you exercise any veto power over the tactical, legal, factual, or whatever kind of

> decision that they made between themselves -- the three attorneys whose appearance was in this case?
>
> A. Never.
>
> Q. Would it be fair to say that you acted as a supplement in the behind-the-scenes preparation of this case?
>
> A. Very much so.
>
> Q. Do you know for a fact what use or in what way the information you brought to Mr. Helfand, Mr. Joseph, and Mr. Goldstein -- how your information, how our input was integrated into their defense preparation?
>
> A. No, never participated even in those defense preparation conferences.

The following transpired during Mr. Helfand's testimony:

> Q. At any point was trial strategy or was an investigative tactic dictated by Darrel Longest and David Gavin?
>
> A. Oh, no come on. A trial strategy?

Whether Longest and Gavin did or did not want to testify at trial, it is understandable why they were never called to the stand by the defense team.[2] Longest and Gavin, however, had no say in deciding what witnesses were to be called, what evidence was to be presented, or what strategies were to be pursued. As neither Longest nor Gavin had the right to insist upon testifying, their failure or refusal to do so did not constitute ineffective assistance of counsel. We shall therefore grant the State's application and vacate the order granting Mrs. Rubin a new trial.

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[2] The Court of Appeals noted that, at the suppression hearing, Longest testified that neither he nor Gavin had suggested registering Mrs. Rubin under a false name but that the decision to use a false name was made by Miller at the hospital. 325 Md. at 564n.3.

APPLICATION FOR LEAVE TO APPEAL GRANTED; ORDER GRANTING A NEW TRIAL VACATED; COSTS TO BE PAID BY LISA JOYCE RUBIN.

APPENDIX F

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND :

VS. : Criminal No. 59303

LISA JOYCE RUBIN :

Defendant :

OPINION AND ORDER

This matter comes before the Court on Petitioner's claim for relief under the Maryland Post Conviction Procedure Act, Maryland Code (1957, 1996 Repl.Vol.), Art. 27 Section 645A. A hearing was held on December 9 through 13, 1996 and after considering the evidence presented and the applicable law, the Court finds as follows.

FACTS

Lisa Rubin (hereinafter "Petitioner") shot and killed her estranged husband Timothy Warner on April 24, 1990. On November 30, 1990, Petitioner was convicted in the Circuit Court for Montgomery County, Maryland of first degree murder and use of a handgun in the commission of a crime of violence. On the murder charge, Petitioner was sentenced to life imprisonment with all but 30 years suspended, with five years probation upon release. On the handgun charge, a twenty year sentence was imposed, to run concurrent with the murder sentence. Petitioner appealed and the Court of Appeals issued writ of certiorari on its own motion prior to consideration of the matter by the Court of Special Appeals. The Court of Appeals affirmed the judgment of the Circuit Court. Petitioner now seeks post-conviction relief in the form of a new trial and asserts various bases in support thereof. The grounds asserted in the Petition for Post-Conviction Relief are as follows:

1. A conflict of interest existed between Petitioner's trial counsel which resulted in a violation of Petitioner's Sixth Amendment right to counsel;

2. Petitioner's Sixth Amendment right to counsel was violated by virtue of ineffective assistance of trial counsel.

The Court of Appeals of Maryland set forth the following facts in *Rubin v. State*, 325 Md. 552, 602 A.2d 677 (1992).

Lisa Rubin (hereinafter "Petitioner") and Timothy Warner (hereinafter "Warner") met in the spring of 1979, married in May 1980 and separated in March of 1990.

Petitioner carried on an affair with William Glisson (hereinafter "Glisson"), while Warner was having an affair with Debra Servin-Leete (hereinafter "Servin-Leete"). After Petitioner ended the relationship with Glisson, he came to Petitioner's home on one occasion and allegedly grabbed her wrists and caused permanent nerve damage. Petitioner and Warner brought a civil suit against Glisson seeking damages in the Circuit Court for Montgomery County, Maryland. During this trial, someone placed cyanide in a bottle of soda in Glisson's refrigerator. The attempted murder was investigated by the Montgomery County Police Department, but no arrests were made.

After the Glisson trial, Petitioner and Warner separated. Petitioner hired Prudential Associates, a private investigative company, to investigate Warner's affair in anticipation of the upcoming divorce. Robert Miller (hereinafter "Miller") was the President of Prudential and Robert Leopold (hereinafter "Leopold") was an investigator with the company.

In April of 1990, Petitioner informed Miller that Warner had told her that he was the one who had poisoned Glisson. Miller referred Petitioner to Darrel Longest, Esq. (hereinafter

"Longest"). Longest was retained and arranged with the Office of the State's Attorney for Montgomery County for Petitioner to be granted immunity with regard to any possible charges relating to the Glisson poisoning in exchange for her information.

On April 20, 1990, Petitioner and Longest met with Detective Charles Shawen of the Montgomery County Police Department and Petitioner related what Warner allegedly had told her about the Glisson poisoning.

On April 23, 1990 Petitioner received a telephone call from Warner and they discussed the need to put to sleep their old and infirm dog, Mutley. They agreed to meet at 6:00 p.m. the next evening at the Peachtree Veterinary Clinic in northern Montgomery County.

Petitioner and Warner met at the Peachtree Clinic the next evening. The two decided to take Mutley for a walk in the woods behind the clinic. Petitioner alleges that while they were in the woods, she told Warner that she had gone to the authorities with the information about Glisson's poisoning. Petitioner then alleges that Warner became enraged, produced a gun and pointed it at her. The gun allegedly produced by Warner was a Beretta pistol which Petitioner owned but claimed had been stolen out of her house prior to the date of the shooting. Petitioner then pulled from her purse a .38 caliber Smith & Wesson revolver and fired at Warner five times, face on, striking him with four of the shots. Warner was able to move down the path approximately 200 feet, where he fell to the ground. Petitioner reloaded the gun and fired five additional shots into the back of Warner as he lay face down. Petitioner claimed that Warner was moving and still had the gun in his possession and she was afraid he could still fire the weapon. Petitioner then reloaded her gun a third time but did not fire any rounds. Petitioner left Warner in the woods with Mutley still attached to his right wrist. The Beretta was found under Warner's body with a full clip but no bullet in the firing chamber.

Petitioner returned to the veterinary clinic and called Miller. The two arranged to meet at a shopping center approximately 10 miles from the veterinary clinic. Miller arrived with Leopold and Miller spoke privately with Petitioner for 90 minutes. Miller directed Leopold to search Petitioner's car for a gun, yet none was found. Petitioner and Miller drove to the scene in Miller's car followed by Leopold in his car.

Petitioner led Miller and Leopold through the woods to Warner's dead body. Miller and Leopold took photographs of the scene and put Mutley in a fenced area behind the clinic. Miller called Longest and told him to come to the clinic. Longest contacted his law partner David Gavin (hereinafter "Gavin") and the two arrived at the clinic at approximately 9:00 p.m. Longest spoke with Petitioner while Gavin spoke with Miller and Leopold and then they talked as a group.

Petitioner had apparently taken a large amount of medication, and Longest told Miller and Leopold to take her to a hospital for a possible drug overdose and have her admitted under a false name. Miller and Leopold transported Petitioner to Montgomery General Hospital and checked her in under the name Sharon Peterson. Petitioner was discharged at 3:00 a.m. on April 25 and spent the remainder of the night at Miller's house. While Petitioner was at the hospital, Longest notified the police that Warner was dead, but did not disclose Petitioner's identity, and the crime scene was then processed.

Petitioner spent the rest of April 25 with Longest and Gavin. Gavin drove Petitioner to her bank to withdraw $105,000.00 to be used as a retainer fee and to cover expenses. In addition, Longest took possession of some of her property, which included a jacket, a purse, .22 caliber bullets and a .38 caliber Smith and Wesson handgun. These items were kept at the law offices of Longest and Gavin. After discussions with the Office of the State's Attorney, during which it was discovered that there was a warrant out for Petitioner's arrest, Petitioner was turned in to the police that evening at 7:00 p.m.

OPINION

1. A CONFLICT OF INTEREST EXISTED BETWEEN PETITIONER AND HER DEFENSE ATTORNEYS WHICH ADVERSELY AFFECTED THEIR PERFORMANCE AND RESULTED IN A VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL.

A. Darrel Longest, David Gavin and Petitioner.

The constitutional right to counsel, under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, includes the right to have counsel's representation free from conflicts of interest. *Austin v. State*, 327 Md. 375, 609 A.2d 728 (1992). A violation of this right has occurred if it can be shown that an actual conflict of interest existed and that the conflict adversely affected the lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

Petitioner alleges numerous conflicts of interest; however, the most significant relationship in dealing with the conflict issue is that of Petitioner and Darrel Longest and David Gavin. Longest and Gavin were members of Petitioner's defense team along with Barry Helfand (hereinafter "Helfand"), Fred Joseph (hereinafter "Joseph") and Alan Goldstein (hereinafter "Goldstein"). Although Longest and Gavin were not seated at the defense table with Helfand, Joseph and Goldstein during the trial, it is clear that they were in fact hired by Petitioner to serve as counsel on her behalf and participated in her defense. This is evident not only from the testimony of Longest and Gavin at the hearing on this Petition but also by the fact that Petitioner unsuccessfully brought proceedings against them in an effort to reclaim the $150,000.00 fee she had paid them to represent her.

The actual conflict with Petitioner arises as a result of the events of April 24 and 25, 1990. After the shooting on

April 24, Petitioner telephoned Robert Miller from the veterinary clinic and Miller and Robert Leopold drove out to meet her at the Peachtree Shopping Center parking lot. The three of them returned to the veterinary clinic and Petitioner showed them where Warner's body was located. They checked the body and found Warner to be dead and took pictures of the scene. At this point, Miller and Leopold were fact witnesses to the crime scene. Miller then called Longest, who arrived at the scene with Gavin.

The police were not yet aware of the shooting and thus were not present. Upon arriving at the scene, Longest told Miller and Leopold that they were now acting as agents for Longest and Gavin and were not to talk to anyone about what had happened. As noted in the recitation of facts above, concerned about a possible drug overdose, Longest directed Miller and Leopold to take Petitioner to a hospital and admit her using an alias. Miller and Leopold transported her to Montgomery General Hospital and checked her in under the name Sharon Peterson. After being released at approximately 3:00 a.m. on April 25, Petitioner spent the night at Miller's house and was taken to his office later that morning.

On April 25, Longest and Gavin spent a portion of the day with the Petitioner. Gavin testified at the hearing on this Petition that he took Petitioner to her bank in order for her to withdraw $100,000.00 to retain Longest and Gavin as her attorneys and an additional $5,000.00 to cover expenses. Longest met with Petitioner at his office and took possession of some of her property. The property taken from Petitioner was Petitioner's purse, .22 caliber bullets, a jacket and a .38 Smith and Wesson handgun which was later determined to be the gun used to shoot Timothy Warner. These items were later discovered and seized upon the execution of a search warrant conducted at the law offices of Longest and Gavin.

Due to their involvement with petitioner on April 24 and 25, Longest and Gavin faced the possibility of criminal charges for obstruction of justice and hindering the apprehension of a criminal. Longest hired Paul Kemp, Esquire as his counsel. Kemp specifically testified at the hearing on this Petition that he was hired in anticipation of charges being brought against Longest. On May 9 and May 16, 1991, grand jury investigations were conducted. However, no charges were brought against Longest or Gavin. The actual result of the grand jury investigation is not significant since the possibility of charges existed against both Longest and Gavin prior to and throughout Petitioner's trial.

The conflict between Longest, Gavin and Petitioner is that in order to fully represent their client, the interests of their client must come before their interests. Longest and Gavin put their interest in collecting a fee and insulating themselves from potential criminal charges before the interests of Petitioner.

Gavin has faced this type of situation before. Gavin's conduct was the focus of the discussion in *United States v. Tatum*, 943 F.2d 370 (1991) where he was found to have had an actual conflict of interest in his representation of multiple clients each with conflicting interests.

After finding an actual conflict did exist between Longest, Gavin and Petitioner, the next step is to determine if the conflict adversely affected the lawyer's performance and prejudiced Petitioner's defense. In *Gee v. State*, 93 Md.App. 240, 611 A.2d 1081 (1992), the Court of Special Appeals of Maryland stated that only a slight showing of prejudice is required for relief to be granted once an actual conflict of interest is demonstrated. The Court in *Gee* went on to say that "[t]he only demonstration of prejudice that is required is that counsel was not as effective as he might have been had the conflict not existed." *Gee*, 93 Md.App. at 248, 611 A.2d at 1085, (quoting *Brown v. State*, 10 Md.App. 215, 227, 269 A.2d 96, 104 (1970)).

This Court finds that the conflict Longest and Gavin had with Petitioner did adversely affect the performance of Petitioner's defense lawyers, which prejudiced her defense. There was no testimony by the defense at trial other than that of Petitioner as to what occurred when Miller, Leopold, Longest and Gavin were at the crime scene prior to any police involvement and what happened during the time period prior to Petitioner turning herself over to the police. On cross-examination of Petitioner, the State brought out the fact that she did not turn herself in until 7:00 p.m. on April 25, and argued in closing argument that this was a calculated effort on her part and was part of a scheme or plan to elude the police. Although no instruction was given regarding flight as consciousness of guilt, the State was permitted to argue it to the jury.

The State questioned Petitioner about checking into Montgomery General Hospital under a false name and was able to argue to the jury that this was an effort by Petitioner to avoid detection by the police. The only evidence offered by the defense to show that someone else made the decision to check her into the hospital under a false name was the testimony of Petitioner. This placed the responsibility for these events on Petitioner, yet these are facts that Longest and Gavin knew were incorrect because they were the ones responsible for removing her from the scene.

Longest and Gavin could have brought out evidence that Petitioner was simply following the advice of her attorneys during this time period. If evidence was offered to corroborate Petitioner's testimony, it would have taken away from the State the argument that these events were a part of a premeditated grand plan or scheme. However, neither Longest nor Gavin came forward with this evidence because they were both under investigation. They chose to protect themselves rather than protect Petitioner.

Longest and Gavin had a duty to zealously defend their client. They could not and did not, due to their actual conflict with her. The conflict was such that they could not possibly have adequately represented her since their interests were directly in conflict with her interests. As a result of the conflict, evidence which would have benefited Petitioner was not brought out at trial. Accordingly, this Court must set aside Petitioner's conviction and grant a new trial.

B. Darrel Longest, David Gavin, Barry Helfand and Robert Miller.

Petitioner alleges that a conflict existed between herself and Darrel Longest, David Gavin, Barry Helfand and Robert Miller. This is based upon the fact that Longest, Gavin, Helfand and Miller were partners in a corporation known as Monitoring Against Alcohol and Drugs, Inc. which was incorporated on October 4, 1989. On January 2, 1990, the corporation was changed to Substance Abuse Monitoring, Incorporated (hereinafter "SAMI").

Petitioner was never advised of the "SAMI relationships" and never executed either a written or oral waiver of the conflict. Although Helfand stated that he never considered the relationship to present a conflict, the decision was not his to make. The relationship should have been disclosed to Petitioner so that she could have decided whether she would waive the conflict or hire a new attorney.

Although a conflict did exist, this court does not believe that Petitioner has suffered prejudice from Longest, Gavin, Helfand and Miller's relationships to each other through SAMI. The allegation is that this conflict affected Barry Helfand's judgment during the trial. Petitioner alleges that the failure to call Longest, Gavin or Miller on behalf of Petitioner was a result of Helfand's desire to protect the financial and personal interests of himself and his friends and put their interests over those of his client. After hearing the evidence presented on this issue, this Court rejects that argument and does not find that Helfand's relationship with SAMI or those involved had any bearing on whether Longest, Gavin or Miller were called to testify.

2. PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED BY VIRTUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

Petitioner alleges in her petition that she was denied effective assistance of counsel based upon grounds other than the actual conflict with her defense attorneys.

A claim based upon a ineffective assistance of counsel must satisfy the two-part test which was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984). The *Strickland* test requires the Petitioner to prove that counsel's performance was deficient and that the deficient performance prejudiced the defense.

The first prong of this test requires a demonstration that counsel's acts or omissions were the result of unreasonable professional judgment and that counsel's performance, given all the circumstances, fell below an objective standard of reasonableness considering prevailing norms. *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064, 80 L.Ed.2d. at 693. The Court of Appeals of Maryland recently discussed the *Strickland* test and the deference given to counsel's with the following:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after a conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

> professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.

Oken v. State, 343 Md. 256, 681 A.2d 30 (1996), (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694, 695).

If successful in proving a deficiency of counsel, the second prong requires a showing that the deficiency in counsel's performance prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693). In order to establish prejudice, Petitioner must show that there is a substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Oken*, 343 Md. at 284, 681 A.2d at 44. The Petitioner must show that ". . . counsel's errors were so serious as to deprive [her] of a fair trial, a trial whose result is reliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 842, 122 L.Ed.2d 180, 189 (1993).

With this background, each of Petitioner's allegations will be addressed:

A. Failure to investigate the Glisson poisoning.

This Court finds that the failure of defense counsel to adequately investigate and present evidence regarding the Glisson poisoning was deficient under the first prong of the *Strickland* test; however, the prejudice which resulted was not sufficient to satisfy the second prong.

The defense put forth by Petitioner was that of self-defense and relied heavily upon her fear of Warner. Successfully presenting a perfect self-defense or even an imperfect self-defense claim initially would have required convincing the jury that Petitioner subjectively believed herself to be in immediate or imminent danger of death or serious bodily harm from her assailant. *State v. Faulkner*, 301 Md.

482, 483 A.2d 759 (1984). Although the burden is on the State to show an absence of such circumstances, without this showing of Petitioner's belief, her claim of self-defense must fail. Distinctions are made between the two types of self-defense regarding the reasonableness of these beliefs, and such reasonableness is a question for the jury to decide.

Although great deference is afforded trial counsel in his or her strategy under *Strickland*, the failure to investigate the Glisson incident was deficient. Petitioner had explained to her defense attorneys that Warner had admitted his involvement in the poisoning, and she testified to the same at trial. However, her defense attorneys did not call any witnesses to corroborate her testimony and she was cross-examined in a way that placed doubt on the truth of her assertions. The State even implied that she was the one who poisoned Glisson. However, there was ample evidence available to the defense which could have corroborated Petitioner's claim that, in fact, it was Warner who had poisoned Glisson.

The primary argument put forth by Petitioner to show her belief of being in immediate or imminent danger of death was that after she informed Warner she had told the police that he poisoned Glisson, Warner reacted violently and pulled out a gun. Petitioner testified that she then shot in self-defense based upon her fear that he was going to shoot her.

After Warner admitted his involvement with the poisoning to Petitioner, she sought immunity in exchange for the information. Longest represented her during these negotiations, and an immunity letter was in fact signed by Matthew Campbell, Esquire, of the Office of the State's Attorney for Montgomery County, Maryland. Explaining why the letter was relevant, Joseph stated that "her fear...is the very essence of our defense." (Trial Transcript, November 29, 1990, at 6). Although the trial Judge did not allow the Campbell letter into evidence, the defense could have called Campbell to explain the immunity letter in order to corroborate Petitioner's testimony.

Longest represented Petitioner in her effort to receive immunity in exchange for her information about Warner and could have so testified. However, if Longest had testified, he would have been subject to examination into his involvement in the events discussed previously concerning the time period between Warner's death and the time Petitioner turned herself over to the police. Longest had a duty to come forward to corroborate Petitioner's testimony about the immunity, but failed to do so.

There was also readily available evidence regarding the source of the chemical used in the poisoning which would have supported Petitioner's testimony, but was never investigated. Det. Shawen took notes during a meeting with Petitioner and Longest an April 20. Contained in the notes is a reference to the possible source of the chemicals used to poison Glisson. The notes list "Marlo Industries, 2609 Cabover Drive, 596-1937" as a possible source of the chemicals. James Roby was the investigator for the defense and testified at the hearing on this Petition that he was never told by any member of the defense to investigate this reference to Marlo Industries.

An investigation was conducted by post-conviction counsel for the Petitioner and revealed a Marlo Industries, Inc. which was located at Cabover Drive in Laurel, Maryland and has since relocated to Hanover, Maryland. Critical information regarding the Glisson poisoning was discovered which would have corroborated Petitioner's trial testimony.

Maurice Boone (hereinafter "Boone") is the CEO of Marlo Industries and testified at the hearing on this Petition. He testified that he remembered a man phoned Marlo seeking a chemical which he testified was silver nitrate, a component of cyanide. The caller told Boone that the chemical was for his personal use at home but that he worked for NASA, and if the chemical worked, there would be a need for the product at his job at NASA. Warner was employed at the Goddard Space Center of the National Aeronautics and Space Administration (NASA). Boone had to order the chemical, so the caller gave

Boone a phone number where he could be reached. When Marlo received the chemical Boone called the number and it turned out to be a wrong number. The caller contacted Marlo again to find out if the chemical had arrived and was told that it had. The caller came into the Marlo office and Boone gave him the chemical. On April 5, 1993, Boone was shown a picture of Warner and identified Warner as the person who had picked up the silver nitrate.

Petitioner's defense was based upon her fear of Warner and this fear stemmed primarily from the events surrounding the Glisson incident. For defense counsel to pursue a self-defense claim without investigating the underlying source of Petitioner's fear falls below a standard of reasonableness and is thus deficient.

Although the failure to investigate the Glisson incident was deficient, sufficient prejudice has not been shown which would warrant relief.

In order to establish prejudice, Petitioner must show that there is substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Oken*, 343 Md. at 284, 681 A.2d at 44. This standard does not allow for relief if the deficiency simply had a conceivable effect on the outcome. *Williams v. State*, 326 Md. 367, 605 A.2d 103 (1992).

The failure to investigate the Glisson incident may have had a conceivable effect on the outcome of the case. If the Glisson incident had been raised and put before the jury, they might have believed that Petitioner was actually in fear of Warner, which would certainly have bolstered the self-defense claim. However, in order for the jury to find that Petitioner was justified based upon self-defense, they would have had to disregard an overwhelming amount of evidence to the contrary.

The Court of Appeals of Maryland discussed the amount of physical and forensic-opinion evidence in demonstrating how far the jury would have to go to find reasonable doubt based upon Petitioner's self-defense claim.

Rubin v. State, 325 Md. 552 at 578-580, 602 A.2d 677 at 690 (1992). The Court of Appeals set forth a list of events that would have to be believed by the jury in order to establish reasonable doubt, and while the standard before this Court is not one of reasonable doubt but rather one of a substantial probability of a different outcome, the circumstances demonstrate that it would take more than the Glisson incident being brought before the jury to show a substantial probability that the result might have been different. According to the Court of Appeals, "a reasonable doubt would have to have been generated by the following:

- Warner entered the former marital abode and stole the Beretta which had been purchased well after he moved out.
- On the evening of the murder Warner carried the Beretta on his person, unobserved by Rubin, although his outer garments were slacks and a shirt, tucked into his slacks.
- Warner carried the stolen Beretta to meet with the victim of the theft on an occasion when they were to discuss divorce and to take Mutley (their dog) on his final visit to the veterinarian.
- Warner had attempted to murder Glisson.
- Warner had admitted to Rubin that he had attempted to murder Glisson.
- In the woods Rubin told Warner that Rubin had told the police that Warner had admitted to her his attempt to murder Glisson.
- Warner reacted with rage, but Rubin neglected to tape record the conversation with Warner.
- In his rage, Warner produced the Beretta for the imminent purpose of killing Rubin by shooting at her--with a large dog leashed to the wrist of his gun hand.
- Before Warner could even chamber a bullet, much less get off a round, Rubin, in a state of panic,

reached into her nylon sports bag and, from among the tape recorder, extra ammunition, and other contents, produced the .38 revolver and got off five rounds, four of which struck Warner.

- In a panic generated by fear for her life, Rubin, as well as the bleeding Warner and the attached Mutley, moved for 200 feet through the woods.
- During that journey Warner did not drop the Beretta.
- Warner dropped the Beretta when he reached the point where he ultimately fell, with the Beretta landing beneath him.
- In a panic generated by fear for her life, Rubin stood over Warner's prone body, opened the revolver's cylinder, ejected the five spent cartridges, reached into her sports bag for the supply of extra .38 ammunition, and reloaded the revolver.
- In a panic generated by fear for her life, Rubin fired five more bullets into the back of Warner as he lay, face down, on the ground.
- In a panic generated by fear for her life, Rubin opened the revolver's cylinder, ejected the five spent cartridges from the second volley, reached into her sports bag for the balance of the supply of extra .38 ammunition, and reloaded the revolver for a third volley, which she then realized was unnecessary."

Rubin v. State, 325 Md. 552 at 578-580, 602 A.2d 677 at 690.

With such an abundance of evidence against Petitioner, even if the jury was given evidence that Warner was the person who actually poisoned Glisson and then told Petitioner about his doing so, this is not enough to demonstrate by a substantial probability that the result would have been different. Accordingly, although Petitioner has shown counsel's performance to be deficient, there has not been sufficient prejudice established and relief is not warranted.

B. Failure to investigate Petitioner's fear of Timothy Warner and his disposition to violence.

Petitioner alleges that the failure to call witnesses who could have demonstrated how much Petitioner feared Warner constituted ineffective assistance of counsel. The witnesses are as follows: Pat Kaufman, Lisa Caiden, Gabrielle Silva, Timothy Silva, Anita Willens, Jon Trapnell, Darrel Longest, Esq., Helene Rubin, Lynn May Counselman, Mimi Segal (now deceased), Josephine Johnson Weldon, Dr. Reuben Horlick, Tim Brown (now deceased), Leonard Olsen, Stephanie Olsen, Gwen Sims and Jeffrey Greenblatt, Esq.

If these witnesses had been called at trial and their testimony was admissible, this Court does not believe that there is substantial possibility that the result of the trial would have been different.

C. Failure to object to inadmissible character evidence and hearsay introduced through the testimony of Debra Servin-Leete.

Petitioner argues that Servin-Leete was able to testify as to prior bad acts committed by Petitioner as well as general character evidence which portrayed Petitioner as being violent.

This Court does not believe that there is a substantial possibility that the result of the trial would have been different had this testimony not been presented at trial.

Accordingly, having considered the entire proceedings, it is this 27th day of February, 1997, by the Circuit Court for Montgomery County, Maryland,

ORDERED, that the Petition for Post-Conviction relief be GRANTED, and it is further

ORDERED that this matter be scheduled for trial.

/s/

JAMES L. RYAN
Judge of the Circuit Court for
Montgomery County, Maryland

APPENDIX G

Court of Appeals of Maryland.

Lisa Joyce RUBIN
v.
STATE of Maryland.

No. 65, Sept. Term, 1991.

March 6, 1992.
Motion for Reconsideration Denied April 8, 1992.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, KARWACKI and ROBERT M. BELL, JJ.

RODOWSKY, Judge.

The principal issues in this murder case involve the evidentiary privilege for confidential communications between attorney and client. Those issues include determining how the privilege operates with respect to tangible evidence received, or simply observed, by counsel or counsel's agent.

Appellant, Lisa Joyce Rubin (Rubin), was found guilty by a jury in the Circuit Court for Montgomery County of the premeditated murder of her estranged husband, Timothy John Warner (Warner), and of the use of a handgun in a crime of violence. Rubin shot and killed Warner on April 24, 1990, in a wooded area in northern Montgomery County. The jury rejected Rubin's self-defense contention. The court sentenced Rubin to life imprisonment, suspended all but thirty years to be followed by five years probation, and made concurrent a twenty year sentence on the handgun charge. Rubin appealed to the Court of Special Appeals. We issued the writ of certiorari on our own motion prior to consideration of the matter by the intermediate appellate court.

Analysis of the attorney-client privilege issues requires a full statement of the facts. Rubin's appeal also complains of the rejection of a defense requested instruction and of the State's rebuttal argument. Additional facts concerning those latter contentions will be stated in Parts V and VI, *infra*.

Rubin and Warner met in the spring of 1979. She was then twenty-three years old and had graduated summa cum laude from college in 1975. He was a seventeen year old high school student. They married in May 1980. Rubin, who is apparently of independent means, supported the couple while Warner obtained a physics degree. At the time of his death Warner was employed at the Goddard Space Center of the National Aeronautics and Space Administration (NASA).

Rubin's self-defense theory evolves out of an affair which Rubin had carried on for some time with one William Glisson (Glisson), a Secret Service agent. Rubin told Warner of her affair with Glisson. Rubin testified that she began her affair with Glisson only after she learned, by reading Warner's diary sometime in 1985, that Warner had been having an affair. She said that Warner later destroyed the diary.

Rubin ended the relationship with Glisson after approximately one and one-half years. According to Rubin, Glisson was extremely jealous. One day Glisson came to the Warner-Rubin home, argued with Rubin, allegedly grabbed her forcefully by the wrists, and also choked her. Rubin claimed permanent nerve damage to her hand as a result of the assault, and she and Warner sued Glisson in the Circuit Court for Montgomery County for damages. In 1989, while the personal injury action was being tried, someone attempted to murder Glisson by placing cyanide in a bottle of cola in Glisson's refrigerator. The attempted murder was investigated by the Montgomery County Police Department, but no arrests were made.

Rubin testified that Warner hated Glisson for having hurt Rubin, and that in January 1990 Warner admitted to Rubin that Warner had attempted to poison Glisson. The admission, Rubin said, was precipitated by a visit to Warner by an FBI agent inquiring about the attempt on Glisson's life.

Warner moved out of the couple's home on March 11, 1990, leaving behind the Mercedes automobile that Rubin had purchased for him. On March 15, 1990, Rubin engaged Prudential Associates, Inc. (Prudential), a licensed private investigating agency, to prove that Warner was committing adultery. The president of Prudential is Robert Lawrence Miller (Miller), and one of Prudential's investigators was Robert Leopold (Leopold). Leopold was to become a witness for the State in the instant matter.

On March 17 Rubin placed a purchase order at a gun shop for a .38-caliber, Smith & Wesson "LadySmith," five shot revolver. At the same time she applied for the necessary permit from the Maryland State Police.

Warner had moved into the residence in Laurel, Maryland of Debra Ann Servin (Servin), a co-worker at NASA who had recently become separated from her husband. Servin described Rubin's visits to Servin's residence and to NASA, which together with Rubin's notes to Warner, formed the basis for the State's argument that Rubin's motive for murdering Warner was resentment at being scorned.

By April 16 Prudential had completed gathering evidence, including photographs, of the Warner-Servin relationship. The agency submitted its report to Jeffrey Greenblatt, Esq. (Greenblatt), the attorney whom Rubin had engaged to be her principal counsel in the domestic matter with Warner.

Rubin's initial contact at Prudential had been with Miller. During the course of the investigation, Miller developed a "personal relationship" with Rubin. They would have late night dinners together, she would confide in him concerning personal problems, and Miller assisted Rubin in finding a new residence.

Between the fifteenth and thirtieth of March, Rubin told

Miller of an admission to her by Warner that he had attempted to poison Glisson. Miller was concerned that Rubin might be exposed to criminal prosecution for failing to report this information to the authorities. Miller advised Rubin to consult counsel, and he recommended Darrel L. Longest, Esq. (Longest) of Longest and Gavin. Longest maintained his office in the same group of townhouses in Rockville as did Prudential. Longest had represented Prudential, Miller and Leopold in various legal matters, Miller had recommended Longest as counsel to Miller's clients, and Longest exclusively used Prudential for investigations required in his law practice.

Rubin, pursuant to an appointment made on March 30, met with Longest on April 4. She paid him a fee of $5,000 which Longest said was not only for advice concerning the possible accessoryship problem, but also for advice concerning financial matters and for assistance to be rendered to Greenblatt in the forthcoming divorce case. Longest, who is a former Deputy State's Attorney for Montgomery County, spoke on behalf of Rubin to Matthew Campbell (Campbell), the then Deputy State's Attorney. By letter of April 10, received by Longest April 16, Campbell represented that the State would not prosecute Rubin if she "tells the truth and cooperates with the police in the investigation" of the attempted murder of Glisson.

At the motions hearing Longest testified that on one occasion prior to the shooting when Rubin was consulting with him, Rubin stated that Miller had related something to her which she had related previously in confidence to Longest. Rubin, Longest testified, expressed surprise that Longest would tell Miller. Longest explained to Rubin that Miller was "part of the team," that Rubin could "tell [Miller] anything and [Longest] can tell him anything, and it is not going to go anyplace." Miller testified at the motions hearing that, as a result of Miller's having referred Rubin to Longest, Prudential had not done, nor had it been asked by Longest to do, any field work investigating the claim that Warner had attempted to kill

Glisson.

On April 10, after her gun permit had been issued, Rubin took possession of the LadySmith revolver. At that time she also purchased and took possession of a .22-caliber, seven shot, semi-automatic, Beretta pistol and fifty rounds of ammunition for each handgun. Rubin testified that, because she was afraid of Warner, she intended to carry the smaller semi-automatic on her person when meeting with Warner, while keeping the larger revolver in the drawer of her bedside table.

Following up on the State's Attorney's letter to Longest, Detective Charles M. Shawen (Shawen) of the Montgomery County Police Department met with Longest and Rubin on April 20. Longest did most of the talking. Shawen's unarticulated reaction to the disclosures was skeptical, because of the impending divorce. The detective proposed that Rubin submit to a polygraph examination. Longest said that he and Rubin would discuss that suggestion, and the matter was left on that basis.

On Monday, April 23, Warner telephoned Rubin from work. They agreed that their old, large, allergy-plagued dog, Mutley, should be killed. They agreed to meet for that purpose the next evening at 6:00 p.m. at the Peachtree Veterinary Clinic in northern Montgomery County, where the couple was well known. In the conversation Warner also said that he wanted to discuss divorce when they met.

At 11:30 p.m. on the twenty-third, Rubin met Miller at a diner in Rockville for supper. Miller's memorandum of that meeting, which Rubin introduced at the suppression hearing, reflects that Rubin was saying that Warner still wanted to kill Glisson, that Warner had buried in his mother's yard evidence, indicated to be keys, linking him to Glisson's attempted murder, and that Warner was preparing to leave the area because he had submitted his resignation to NASA and had removed $50,000 from the couple's safety deposit box. Miller's memorandum comments that "the story keeps getting more and more complicated."

Rubin and Warner met at the Peachtree Clinic about 6:00 p.m. on April 24, after Warner had left Servin to wait for him at a shopping center. From all of the evidence, including particularly a trail of the victim's blood leading up to the body, two clusters of five, spent, .38-caliber cartridges next to the body, and the nature of the wounds, the jury could find the following. Rubin arrived in her Alfa Romeo sports coupe more than one hour in advance of the scheduled meeting time, for the purpose of reconnoitering the area. She carried a large nylon handbag which contained, in addition to ordinary personal items, the loaded revolver and ten extra rounds of .38-caliber ammunition, the loaded Beretta and, in a clear plastic baggie, seven additional rounds of .22-caliber ammunition, a tape recorder and two tapes. Warner, with Mutley, arrived in a Mustang borrowed from members of his family. Warner and Rubin walked down a path through the woods behind the clinic. Warner, who was right-handed, had Mutley on a leash that was wrapped around Warner's right wrist. The couple proceeded about 1,000 yards down the woodland path. Rubin, using the .38, began shooting at Warner, face on. Three shots struck him in the chest or arms or both, and one shot missed. Bleeding, he was able to move back down the trail for about 200 feet. At some point, aiming the .38 downward and at close range, Rubin shot Warner in the front of the skull.[1] Warner fell, lying face

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[1] The autopsy report's description of this wound reads: "Situated on the right frontal scalp, 1" below the top of the head and 1 1/4" to right of the midline was a gunshot wound of entrance. The wound defect measured 7/16" in greatest dimension and to include an abrasion margin with extension tear measuring up to 5/8" oriented antero-inferiorly. There was no soot on the skin around the entrance wound. There was gunpowder stippling with a spread up to 2" oriented anteriorly. The hemorrhagic wound track extended through the soft tissues of the

(continued...)

down on the ground. Rubin ejected the five spent cartridges and reloaded. She fired five more rounds into Warner's upper left back as he lay prone. She ejected the five spent cartridges, reloaded the .38, and placed it back in the nylon handbag. She placed the Beretta under Warner's body. Although the Beretta's clip was full, there was no bullet in the firing chamber. In the course of these activities, whatever their sequence, Rubin dropped and left on the ground one of the .22-caliber bullets that had been in the baggie. She left Warner's body in the woods with Mutley still attached by the leash to Warner's right wrist.

Rubin's version of the events is that she had hoped to record at the meeting Warner's admissions of attempted murder. In preparation for meeting Warner, she looked for the Beretta but did not see it. She instead took the . 38 and, in order to feel more secure, some extra ammunition. In the woods Warner, whom Rubin suggests must have stolen the Beretta from Rubin's bedroom, produced the Beretta and was about to kill Rubin after Rubin told Warner that Rubin had told the Montgomery County police of Warner's admission of the attempted murder of Glisson. When Warner threatened to kill her with the Beretta, Rubin pulled the .38 from her purse and, in panic, kept firing.[2]

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[1](...continued)
scalp, perforated the right frontal bone which exhibited inner bevelling, perforated the right frontal lobe, right temporal lobe, and penetrated, fractured and terminated in the right middle fossa of the base of the skull."

[2] Rubin explained the reloading of the weapon in these words: "A. He fell down and I had been firing while he had been coming towards me and then I kept firing. I didn't have any more bullets because I kept firing and then nothing was happening. It was just clicking, so I reloaded the gun.

(continued...)

Rubin, visibly shaken, returned to the veterinary clinic where she used the telephone. She told the clinic staff that she was able to reach Warner, who would be delayed. In actuality, she telephoned Miller at Prudential. Rubin arranged to meet Miller at a shopping center 9.6 miles from the clinic at Route 28 and Quince Orchard Road. In the telephone call Rubin did not tell Miller the purpose of the requested meeting. Miller, fearing that there was going to be a confrontation with Warner, thought it advisable to bring along a witness. Miller directed Leopold, who was in the office, to come with him. Miller also brought a camera. Neither Miller nor Leopold attempted to telephone Longest from the Prudential office. Miller and Leopold traveled in separate cars.

At the shopping center Miller spoke privately with Rubin for approximately twenty minutes. While there, Miller directed Leopold to search the Alfa Romeo for a gun. Leopold searched, but found none. Miller has a telephone in his car, but he did not attempt to telephone Longest from the shopping center. Rather, Rubin traveled with Miller in his car, followed by Leopold in his car, to the veterinary clinic.

Rubin led Miller and Leopold along the path through the woods to Warner's body, to which Mutley was still leashed. Leopold testified that Rubin, at the crime scene,

> "kept mumbling over and over things to the effect of, 'he's really dead. I can't believe it. I shot him. I didn't mean to. I only wanted to

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[2] (...continued)
"He had fallen down and I looked at him and he was still moving. He was making sounds and I knew that he still had the gun with him and I thought that he was still going to try to shoot me.
"Q. What did you do?
"A. I fired my gun again and I just kept firing it and I was so scared. I have never been so scared before. I thought he was going to kill me."

hurt him. I shot him. He kept coming at me. He's really dead.' Over and over again."

Miller took photographs of the corpse and of the scene. Leopold put the dog in a fenced area behind the clinic.

Walking back down the path to the clinic Leopold told Miller that they should call the police, but Miller told Leopold that the first call should be to Longest.

Using his car telephone, Miller called Longest at Longest's home. Miller told Longest that Miller was with Rubin at a veterinarian's in upper Montgomery County, that Miller believed Warner was dead, and that Longest should come immediately. Longest made arrangements to meet his partner, David Gavin, and the two arrived at the Peachtree clinic at about 9:00 p.m.

At the parking lot of the clinic Longest talked with Rubin and Gavin talked with Miller and Leopold. Then, according to Longest, they conversed in a group. The essence of the conversation was that they would discuss the matter only among themselves "because our relationship with our client was going to continue in the same fashion that it had."

Rubin apparently had ingested a substantial amount of tranquilizers or other medication. Longest directed Leopold and Miller to take Rubin to the hospital, have her admitted for a drug overdose, and not to talk to anyone about what they had seen or heard. Miller and Leopold took Rubin to Montgomery General Hospital where she was registered under the name of Sharon Peterson. Rubin was not admitted and was discharged at 3:00 a.m. She spent the remainder of the night at the home of Miller and his wife, who is also an investigator for Prudential.

Meanwhile, Longest had notified the police who began processing the crime scene, illuminated by flood lights. During that processing a beeper which Warner had on his person was activated by a telephone call from Servin who was trying to find out what had delayed Warner. The police answered the page and learned from Servin that Warner had planned to meet

Rubin at the veterinary clinic. A police check of handgun records revealed that both the Beretta found under the body and a .38-caliber Smith & Wesson had recently been purchased by Rubin. The veterinarian placed Rubin at the clinic on the evening of the 24th. By early afternoon on the day following the murder the police, utilizing the information reviewed in this paragraph, obtained a warrant for Rubin's arrest. She surrendered herself on the evening of that day.

Also on the day following the murder Leopold, without Rubin's consent, contacted the police, was interviewed, and gave information which was incorporated into an application for a warrant that was issued to search the offices of Longest and Gavin. This application was admitted in evidence at the hearing on Rubin's motion to suppress. The application recites Leopold's activities and observations of the preceding evening, with the following additional particulars.

At the veterinary clinic Gavin asked Miller and Leopold if there were any guns and Leopold told him, "No." Longest told the investigators "'you are working as agents for Longest and Gavin,'" and not to tell anyone what had happened. Longest further instructed Miller and Leopold to take Rubin to the hospital, get her admitted, and to use an alias.[3] The application further recites:

> "While Rubin was being treated Leopold looked through her purse, a tan colored Lesport bag. In the purse he observed a baggie with about 5 or 6 bullets in it and a minicassette recorder with 2 cassette tapes. Miller ended up taking possession of Rubin's purse and put it in the trunk of his vehicle. At around midnight, Miller left the hospital to meet with Longest and

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[3] At the suppression hearing Longest testified that he first learned from Miller that the decision had been made at the hospital to register Rubin under a false name.

Gavin. The three then returned to the hospital at about 12:50 a.m. At around 2:00 a.m. Longest instructed Leopold to leave the hospital, which he did, and went home."

The application also states that on April 25 Leopold spoke with an employee of Longest and Gavin, Debbie Bundy. Bundy was delivering to a developing service the film which Miller had taken of the crime scene the preceding night.

Additional information underlying the search warrant was obtained by the police on the evening of April 25 from an anonymous female caller. She restated much of what Leopold had told the police. This informant, it was later learned, was an employee of Prudential to whom Leopold had described the events of the night and early morning of April 24-25.

The search of the Longest and Gavin offices on April 26 produced a number of items. In a locked, or lockable, file cabinet in the basement was the nylon bag; separate from the bag, in a manila envelope, was the .38- caliber revolver, fully loaded; and, in another manila envelope, separate from the bag, was the plastic baggie containing six .22-caliber bullets.

I

Rubin moved to suppress, on the ground, *inter alia*, of attorney-client privilege, all communications made by Rubin. As argued, the motion was directed principally to testimony by Leopold narrating communications by and between Rubin, Miller, Leopold, Longest, and Gavin, including particularly Rubin's admissions to Miller and Leopold when she brought them back to the crime scene. At the motions hearing, and in this Court, Rubin submits that her consultation with, and legal representation by, Longest embraced all aspects of the relationship between Warner and Rubin and that, when she telephoned Miller from the Peachtree clinic, she sought assistance from him as an agent for Longest. Indeed, at the suppression hearing Rubin testified that her reason for calling

Miller immediately after shooting Warner was "[b]ecause [she] wanted to get in touch with Mr. Longest," and she was aware that Miller "was able to get a hold of Mr. Longest."

The circuit court accepted Rubin's analysis in part and, on credibility grounds, rejected it in part. The court held that the relationship of attorney and client between the Longest firm and Rubin did not arise with respect to the death by shooting of Warner until Longest and Gavin arrived on the scene at the Peachtree clinic.

In *Harrison v. State*, 276 Md. 122, 132, 345 A.2d 830, 836 (1975), we described the privilege in the following fashion:

> "'The result of the authorities is that to make the communications privileged, they must be made during the existence of the actual relation of attorney and client, or during interviews and negotiations looking to the establishment of such a relationship between the parties, and must relate to professional advice and to the subject-matter about which such advice is sought. When such conditions exist, the law will not permit the counsel to divulge the communications without the consent of the client.'"

(Quoting *Lanasa v. State*, 109 Md. 602, 617, 71 A. 1058, 1064 (1909) (emphasis omitted)).

The circuit court correctly recognized that the attorney-client privilege could embrace communications between Rubin and the investigators from Prudential. In *State v. Pratt*, 284 Md. 516, 520, 398 A.2d 421, 423 (1979), we observed that

> "given the complexities of modern existence, few if any lawyers could, as a practical matter, represent the interest of their clients without a variety of nonlegal assistance. Recognizing this limitation, it is now almost universally accepted in this country that the scope of the attorney-

> client privilege, at least in criminal causes, embraces those agents whose services are required by the attorney in order that he may properly prepare his client's case."

In its ruling the circuit court applied the legal requirements that the communication must be made during the existence of the actual relation of attorney and client, or during interviews directed thereto, and must relate to the subject-matter about which the professional advice is sought. *Harrison v. State*, 276 Md. at 132, 345 A.2d at 836. For example, *Bieber v. State*, 8 Md.App. 522, 261 A.2d 202, *cert. denied*, 258 Md. 725 (1970), involved testimony by an attorney called by the State in a prosecution for forging and uttering a deed of trust. The forged instrument had been seized from the attorney's possession under a search warrant. Over a privilege-based objection, the attorney testified that the defendant had asked the attorney to hold the instrument which had been mailed by the clerk of court, at the defendant's direction, to the attorney after recordation. The attorney had previously handled four transactions for the defendant, as client, and the attorney maintained a file of documents relating to those matters. With respect to the "transaction" involving the allegedly forged deed of trust, however, the attorney had not rendered any professional services, but had deposited the instrument in the client's file. The Court of Special Appeals, speaking through Judge Orth, concluded "in the light of the evidence, that an attorney-client relationship did not exist between [the attorney] and appellant with respect to the deed of trust." 8 Md.App. at 547, 261 A.2d at 215.

In the matter before us, different inferences could be drawn, including those relating to the scope of the subject matter of Longest's representation of Rubin prior to the shooting, to the Longest-Prudential relationship, and to the purpose of Rubin's telephoning Miller. These conflicts were for the circuit court to resolve. *See United States v. Tedder*, 801 F.2d 1437 (4th Cir.1986), *cert. denied*, 480 U.S. 938, 107

S.Ct. 1585, 94 L.Ed.2d 775 (1987) (where privilege issue presented complex issues of fact, record was consistent with trial judge's finding that defendant, an attorney, spoke to another attorney, in law firm where both were employed, as a friend and not as attorney, even though still other attorneys in same firm were advising defendant concerning potential criminal charges).

The circuit court flatly stated that it "does not believe Ms. Rubin's testimony that she called Bob Miller because she wanted to get Mr. Longest." This finding was based on the facts that Rubin had met Miller the previous evening seeking his advice, independently of Longest; that Rubin had a personal relationship with Miller that had nothing to do with Longest; that Rubin had called Miller directly without first attempting to telephone Longest; that Rubin did not ask Miller to have Longest come to the scene; and that Miller had not attempted to reach Longest from the Prudential office, after receiving Rubin's call, or from the shopping center, after meeting with Rubin. The court further found that there was no employer-employee relationship between Longest and Prudential, and that Miller and Leopold were not acting as agents of Longest and Gavin when the former responded to Rubin's call. Finally the court found that Rubin, when making statements to Miller and Leopold prior to the arrival of the attorneys, did not believe that they were then acting as agents for Longest and had no expectation that her statements would be protected by attorney-client privilege. Indeed, the court found, based on Rubin's emotional state at the time, that it was highly unlikely that she gave any consideration at all to questions of confidential communication.

Under all of the circumstances of this case the circuit court was warranted in concluding that the attorney-client relationship respecting the homicide did not arise until the attorneys arrived at the clinic.

II

Rubin next contends that the circuit court erred in permitting Leopold to describe at trial, over objection, a visual observation made by him. Leopold testified that there came a time "during the evening" when he observed approximately six rounds of live .22-caliber ammunition in Rubin's handbag.

A

The manner in which this issue arose requires discussion. In the phase of the pretrial hearing dealing with Rubin's motion to suppress her statements, the testimony was directed almost exclusively to the period up to the arrival of Longest and Gavin at the Peachtree clinic. Neither at that phase, nor at trial on the merits, was there any testimony describing the circumstances under which Leopold looked into Rubin's purse. Some of the circumstances were revealed at the phase of the pretrial hearing dealing with suppression of the evidence from the attorneys' offices, when the application for the search warrant was introduced as a State's exhibit. The purpose for which that evidence was admitted was not limited. Indeed, defense counsel wanted the search warrant introduced "at least for the purposes of any kind of appellate review."

During the course of the State's case-in-chief at trial on the merits, the State sought, prior to placing Leopold on the stand, a clarification concerning the scope of the court's pretrial ruling on attorney-client privilege. The discussion of this issue was held in chambers and off the record. When proceedings on the record resumed the court ruled that evidence of Leopold's observation would be admitted, for reasons we more fully state below. Rubin was given a continuing objection to that testimony.

In ruling on the admissibility of Leopold's observation evidence, the circuit court could consider the hearsay in the application to search Longest's office. *Collins v. State*, 39

Md.App. 165, 384 A.2d 120 (1978); L. McLain, *Maryland Evidence* § 104.2, at 72 (1987). The search warrant application tells us that Leopold looked in Rubin's handbag while Rubin was being treated at the hospital.

Thus, Leopold's observation was made after Longest began representing Rubin with respect to the Warner homicide and after Longest had directed Miller and Leopold to accompany Rubin to the hospital. The record, however, is far from clear as to whether Leopold's observation resulted from a communication or intentionally communicative act on the part of Rubin.[4] Nevertheless, it is clear that Leopold's opportunity to observe the contents of the bag resulted solely from his relationship to Rubin as an investigator on the defense team.

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[4] We use the terminology "intentionally communicative act" in the sense in which it is used in E. Cleary, *McCormick on Evidence* § 89, at 213 (3d ed. 1984), where the author states:

> "The commonly imposed limitation of protection to communications passing between client and attorney, while logically derived from the policy rationale of the privilege, does raise certain problems of construction where the information acquired by the attorney does not come in the conventional form of oral or written assertions by the client. Initially it is fairly easy to conclude, as most authority holds, that observations by the lawyer which might be made by anyone, and which involve no communicative intent by the client, are not protected. Conversely, testimony relating intentionally communicative acts of the client, as where he rolls up his sleeve to reveal a hidden scar or opens the drawer of his desk to display a revolver, would as clearly be precluded as would the recounting of statements conveying the same information."

(Footnote omitted).

B

In overruling the objection to Leopold's observation testimony the circuit court applied a rule enunciated by Justice Tobriner for the Supreme Court of California in *People v. Meredith*, 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46 (1981). In that case the accused, while confined and awaiting trial for murder and robbery, told his then counsel that the victim's wallet could be found in a barrel behind the client's home. The attorney sent an investigator to that location who found the wallet and delivered it to the attorney who turned it over to the investigating police officer. At a preliminary hearing the investigator testified, over objections by new counsel for the accused, where the wallet had been found.

The California court held that the attorney-client privilege "extends to protect observations made as a consequence of protected communications." 175 Cal.Rptr. at 618, 631 P.2d at 52 (footnote omitted). But in *Meredith* the attorney's investigator had removed the wallet from the place where he found it, and that location, behind the home of the accused, was a significant fact. Discussing that aspect of the problem, the court said:

> "When defense counsel alters or removes physical evidence, he necessarily deprives the prosecution of the opportunity to observe that evidence in its original condition or location. [T]o bar admission of testimony concerning the original condition and location of the evidence in such a case permits the defense in effect to 'destroy' critical information; it is as if ... the wallet in this case bore a tag bearing the words 'located in the trash can by [the accused's] residence,' and the defense, by taking the wallet, destroyed this tag. To extend the attorney-client privilege to a case in which the defense removed evidence might encourage

> defense counsel to race the police to seize critical evidence."

Id. at 619, 631 P.2d at 53.

> For those reasons the court held that "whenever defense counsel removes or alters evidence, the [attorney-client] privilege does not bar revelation of the original location or condition of the evidence in question. We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and condition of that evidence loses the protection of the privilege."

Id. at 620, 631 P.2d at 54 (footnote omitted).

Rubin argues that we should not adopt the Meredith rationale because it makes the defense attorney "an important prosecution witness as soon as he alters or removes evidence, perhaps in even a slight or inevitable way." Appellant's Brief at 19. Rubin also contends that if *Meredith* is accepted by this Court, it should not be applied here due to a lack of evidence that the Rubin defense team altered the evidence.

Decisions discussing testimony by counsel under the subject circumstances generally do so as an offshoot of discussing counsel's responsibility when discovering or receiving tangible evidence of crime. "The cases all begin with the premise that a lawyer may not actively participate in hiding [a fruit or instrumentality of crime], or take possession of it in such a way that its discovery becomes less likely." 1 G. Hazard & W. Hodes, *The Law of Lawyering* § 1.6:401, at 193 (2d ed. 1991) (Hazard).

Frequently cited for the foregoing proposition is *In re Ryder*, 263 F.Supp. 360 (E.D.Va.), *aff'd per curiam*, 381 F.2d 713 (4th Cir.1967). The case was a disciplinary proceeding against an attorney whose client, an accused robber, told the attorney of money in a safety deposit box. Using a power of attorney from the client, the lawyer entered the box, found money and a sawed-off shotgun, and moved those contents to another safety deposit box rented in the attorney's name. Then Chief Judge Hoffman and Judges Lewis and Butzner, in a per curiam memorandum at the district court level, rejected the argument that the attorney's conduct was the exercise of attorney-client privilege. 263 F.Supp. at 365. In taking "the initiative in transferring the incriminating possession of the stolen money and the shotgun [the attorney] went far beyond the receipt and retention of a confidential communication from his client." *Id.* In affirming, the Fourth Circuit panel of Judges Sobeloff, Boreman and Winter said:

> "It is an abuse of a lawyer's professional responsibility knowingly to take possession of and secrete the fruits and instrumentalities of a crime. [The attorney's] acts bear no reasonable relation to the privilege and duty to refuse to divulge a client's confidential communication. Ryder made himself an active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact."

381 F.2d at 714.

To the same effect *see People v. Superior Court (Fairbank)*, 192 Cal.App.3d 32, 237 Cal.Rptr. 158, 159 (1987) ("[D]efense counsel may not retain physical evidence pertaining to the crime charged."); *Commonwealth v. Stenhach*, 356 Pa.Super. 5, 16, 514 A.2d 114, 119 (1986), *appeal denied*, 517 Pa. 589, 534 A.2d 769 (1987) ("[T]he overwhelming majority of states ... hold that physical evidence of crime in the possession of a criminal defense attorney is not subject to a privilege but must be delivered to the prosecution."); *Hitch v. Pima County Superior Court*, 146 Ariz. 588, 594, 708 P.2d 72, 78 (1985) ("[I]f the attorney has reasonable grounds to believe that the evidence might be destroyed ... he may turn the physical evidence over to the prosecution."); *Clutchette v. Rushen*, 770 F.2d 1469, 1472 (9th Cir.1985), *cert. denied*, 475 U.S. 1088, 106 S.Ct. 1474, 89 L.Ed.2d 729 (1986) ("California law requires that a defense attorney must, after a reasonable time, turn evidence taken from its original resting place over to the prosecution."); *People v. Nash*, 110 Mich.App. 428, 447, 313 N.W.2d 307, 314 (1981), *aff'd in relevant part*, 418 Mich. 196, 341 N.W.2d 439 (1983) ("[D]efendant's attorney had a duty to relinquish the evidence to the authorities and ... he did not violate defendant's attorney-client privilege by doing so."); *People v. Meredith, supra*; *Morrell v. State*, 575 P.2d 1200, 1210 (Alaska 1978) ("[A] criminal defense attorney must turn over to the prosecution real evidence that the attorney obtains from his client" or from a non-client third party.); *Anderson v. State*, 297 So.2d 871, 875 (Fla.App.1974) (attorney acted properly where he turned over stolen goods delivered by his client to his office); *State v. Dillon*, 93 Idaho 698, 710, 471 P.2d 553, 565 (1970), *cert. denied*, 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971) ("An attorney may not act as a depository for criminal evidence, and he may not suppress such evidence." (Footnote omitted)); *People v. Lee*, 3 Cal.App.3d 514, 526, 83 Cal.Rptr. 715, 722 (1970) ("A defendant in a criminal case may not permanently sequester physical evidence such as a weapon or other article used in the perpetration of a crime by delivering it to his attorney."); *State ex rel. Sowers v. Olwell*, 64 Wash.2d 828, 834, 394 P.2d 681, 684-85 (1964) ("[T]he attorney, after a reasonable period, should, as an officer of the court, on his own motion turn [criminal evidence] over to the prosecution.").

Accord Spencer v. State, 76 Md.App. 71, 79 n. 2, 543 A.2d 851, 855 n. 2 (1988) (dicta); L. McLain, *Maryland Evidence* § 503.7, at 491 (1987) ("[C]learly the attorney cannot obstruct justice by destroying or concealing the evidence or aiding the client in so doing." (Footnote omitted)); J. Murphy, Jr., *Maryland Evidence Handbook* § 905H, at 333 (1989)

("[T]he lawyer cannot interfere with the state's right to recover tangible evidence at the location and in the condition it was observed by defense counsel.").

When, complying with the above-described obligation, defense counsel has furnished tangible evidence in counsel's possession to the prosecution, the question arises as to how the prosecution's possession of the evidence is to be explained at trial. If the location of the real evidence was revealed to defense counsel by a non-client third party, then the attorney-client privilege does not prohibit the State from proving, even through testimony from the attorney or the attorney's agent, where and how the evidence was located. See *Morrell v. [Alaska]*, 575 P.2d at 1210 ("[I]f the evidence is obtained from a non-client third party who is not acting for the client, then the privilege to refuse to testify concerning the manner in which the evidence was obtained is inapplicable."); *Hitch v. Pima County Superior Court*, 146 Ariz. at 595, 708 P.2d at 79; *People v. Lee*, 3 Cal.App.3d at 527, 83 Cal.Rptr. at 723.

On the other hand, when the client tells the attorney where the tangible evidence is located and the attorney removes and takes possession of the evidence, or where the client delivers the evidence to the attorney by an intentionally communicative act or accompanied by, or resulting from, a confidential communication, the attorney-client privilege is implicated. Although the physical item itself is not privileged, the accompanying communications ordinarily are privileged. Hazard states that "[g]enerally, the defendant is required to stipulate where evidence originated, in exchange for the exclusion of evidence as to how it came into police hands." Hazard at § 1.6:401, at 194 (citing *People v. Meredith* (footnote omitted)).

When the issue arises absent any stipulation, the reasoning in the reported decisions becomes exceedingly close. One of the earliest cases to urge non-disclosure by the prosecution of the defendant as the source of the evidence is

State v. Olwell, 64 Wash.2d 828, 394 P.2d 681. That was an appeal from a judgment of contempt against the attorney for refusal to comply with a subpoena duces tecum, returnable to a coroner's inquest and seeking all knives possessed by or under the control of the attorney and relating to the client. The appellate court inferred that the knife came into the attorney's possession as a result of a communication by the client, and not through the attorney's investigation with third parties. The court next interpreted the subpoena to seek, in addition to any knife, the testimony of the attorney about physical evidence received from the client. The contempt judgment was reversed because the subpoena was invalid.

People v. Nash, 110 Mich.App. 428, 313 N.W.2d 307, involved the prosecution of the attorney's client for the murder of her husband. The police executed a search warrant in the attorney's office where they seized the murder weapon, ammunition, and the victim's wallet. These items were introduced at trial. "There was no testimony regarding the source from which defense counsel had received the evidence, however, it was elicited at trial that the evidence was procured pursuant to a search of the defense attorney's office." 313 N.W.2d at 312. The court held that "permitting the prosecutor to show that defendant's attorney had such evidence in his possession invites the jury to infer that defendant gave the evidence to her attorney. The prosecutor should not be allowed to accomplish by inference what he is clearly prohibited from doing by direct proof." *Id.* at 314.

Much the same reasoning was employed in *Anderson v. State*, 297 So.2d 871. The client was charged with receiving a stolen dictaphone and calculator. He retained counsel and subsequently delivered the stolen items to counsel's receptionist. Counsel in turn delivered them to the police. The prosecution subpoenaed the attorney and the receptionist to testify at trial. They obtained certiorari review of the denial of their motion to quash. The appellate court held that requiring the attorney to testify that the client once had had the stolen property in his possession "would be to do violence to the fundamental concept of the attorney-client privilege." *Id.* at 875.

In *Commonwealth v. Stenhach*, 356 Pa.Super. 5, 514 A.2d 114, the court stated the rule to be that "the prosecution is entitled to use the physical evidence [delivered to it by the defense counsel] as well as information pertaining to its condition, location and discovery but may not disclose to a fact-finder the source of the evidence." 514 A.2d at 123. *Stenhach* was a criminal prosecution of defense attorneys who were convicted of hindering prosecution and tampering with evidence in an underlying murder case. The evidence in the murder case was a rifle stock which broke away from the barrel when the client struck the victim with the rifle. The client had disposed of the stock, but later drew a map for defense counsel which enabled the defense investigator to find the stock and deliver it to counsel. Although counsel had been required by court order in the murder case to produce the stock, it was not introduced in evidence. In articulating the rule, the court used "location" to mean where the stock was found and used "the source of the evidence" to mean the communication from the client.

People v. Meredith, relied upon by the circuit court in the instant matter, is factually similar to *Stenhach* in that the client's communications to counsel led the defense investigator to the place where the client had discarded physical evidence, which the investigator then took to counsel. Under those circumstances *Meredith* held "that whenever defense counsel removes or alters evidence, the [attorney-client] privilege does not bar revelation of the original location or condition of the evidence in question," 175 Cal.Rptr. at 619, 631 P.2d at 54, even if that original location indicates the accused as the source. *Meredith* is an exception to the general rule that, where the client is the source of physical evidence delivered by defense counsel to the prosecution, that source will not be disclosed to the fact-finder. It is clear from the footnote that the *Meredith* court inserted immediately following the statement of the exception that *Meredith* is not intended to overturn the general rule.

> "In offering the evidence, the prosecution should present the information in a manner which avoids revealing the content of attorney-client communications or the original source of the information. In the present case, for example, the prosecutor simply asked Frick where he found the wallet; he did not identify Frick as a defense investigator or trace the discovery of the wallet to an attorney-client communication."

631 P.2d at 54 n. 8.

People v. Superior Court (Fairbank), 192 Cal.App.3d 32, 237 Cal.Rptr. 158, a case which applied the *Meredith* holding, also dealt with a communication from the client that advised the attorney where weapons could be found. In *Clutchette v. Rushen*, 770 F.2d 1469, where the court upheld on habeas corpus review a California conviction affirmed on the basis of *Meredith*, the accused client had told his attorneys where certain incriminating receipts could be found, and the attorneys dispatched their investigator to retrieve them.

The cases in which the *Meredith* exception has been applied involved tangible evidence that was left at a fixed location from which it was later removed by the defense team based on a communication from the client. Here, the State seeks to equate Rubin's person, or the handbag carried by her, with the fixed locations involved in the *Meredith* type of case. If Rubin had walked into Longest's office, engaged him to represent her, reached in the pocket of her coat, withdrew the murder weapon and the baggie of .22-caliber bullets, and handed them to Longest, Longest, by receiving the delivery, could not be said to have altered the condition of the evidence. The alteration which the State contends took place in the instant matter was the removal of the baggie of .22-caliber bullets from the handbag, where Leopold had earlier observed it, and placing the baggie of bullets in an envelope in the file cabinet at Longest's office. What the State here seeks to classify as a *Meredith* "alteration" is the separation of the link between the bullets and the handbag which Rubin carried at the time of the murder. That separation is not, however, an alteration of location. It is a separation of the link between the physical evidence in the possession of defense counsel and the client source of that evidence. We hold that the Leopold observation testimony violated the rule recognized by nearly all courts that have considered the question, namely, that when the State uses in its case physical evidence obtained from defense counsel who in turn obtained it from the client as a result of privileged communications, the State ordinarily should not identify the client as the source of that evidence.

When the State introduced the bullets and other physical items in evidence through the police officer who had executed the search warrant at Longest's office, the State did not identify the premises as the office of Longest, or identify Longest as counsel for Rubin at the time. Indeed, the State did not even identify the premises as a law office. But Leopold's observation was made while acting as an agent for Longest who was then representing Rubin concerning Warner's death. The effect of admitting the observation testimony is the same as if Longest testified, without Rubin's consent, that Rubin had delivered the bullets to him.

C

Although Leopold's testimony describing his observation of the bullets in Rubin's purse should have been excluded as privileged, the error is harmless beyond a reasonable doubt under the test of *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976). That is because, under the unusual facts of this particular case, the evidence of guilt was overwhelming. The relevance of the Leopold observation evidence was that, if Rubin carried .22- caliber bullets on the night of the murder, it tended to make it more likely that she also carried the Beretta. But, if the Leopold observation evidence had been excluded, the remaining evidence could not give rise to a reasonable doubt.

Under Rubin's self-defense explanation of the unchallenged physical and forensic-opinion evidence a reasonable doubt would have to have been generated by the following.

- Warner entered the former marital abode and stole the Beretta which had been purchased well after he moved out.
- On the evening of the murder Warner carried the Beretta on his person, unobserved by Rubin, although his outer garments were slacks and a shirt, tucked into his slacks.
- Warner carried the stolen Beretta to meet with the victim of the theft on an occasion when they were to discuss divorce and to take Mutley on his final visit to the veterinarian.
- Warner had attempted to murder Glisson.
- Warner had admitted to Rubin that he had attempted to murder Glisson.
- In the woods Rubin told Warner that Rubin had told the police that Warner had admitted to her his attempt to murder Glisson.
- Warner reacted with rage, but Rubin neglected to tape record the conversation with Warner.
- In his rage, Warner produced the Beretta for the imminent purpose of killing Rubin by shooting at her--with a large dog leashed to the wrist of his gun hand.
- Before Warner could even chamber a bullet, much less get off a round, Rubin, in a state of panic, reached into her nylon sports bag and, from among the tape recorder, extra ammunition, and other contents, produced the .38

revolver and got off five rounds, four of which struck Warner.

- In panic generated by fear for her life, Rubin, as well as the bleeding Warner and the attached Mutley, moved for 200 feet through the woods.
- During that journey Warner did not drop the Beretta.
- Warner dropped the Beretta when he reached the point where he ultimately fell, with the Beretta landing beneath him.
- In panic generated by fear for her life, Rubin stood over Warner's prone body, opened the revolver's cylinder, ejected the five spent cartridges, reached into her sports bag for the supply of extra .38 ammunition, and reloaded the revolver.
- In panic generated by fear for her life, Rubin fired five more bullets into the back of Warner as he lay, face down, on the ground.
- In panic generated by fear for her life, Rubin opened the revolver's cylinder, ejected the five spent cartridges from the second volley, reached into her sports bag for the balance of the supply of extra .38 ammunition, and reloaded the revolver for a third volley, which she then realized was unnecessary.

The requirement that an error be harmless beyond a reasonable doubt before it may be treated as non-prejudicial is not intended to afford an opportunity for jury nullification, particularly of the prohibition against premeditated murder. We are satisfied beyond a reasonable doubt that, absent the Leopold observation evidence, the jury's verdict nevertheless would have been the same--guilty of premeditated murder and of use of a handgun in a crime of violence.

III

Rubin contends that there is a want of probable cause for the issuance of the warrant for the search of Longest's office because information which violated her attorney-client privilege must be excised from the application for the warrant. This leaves, Rubin argues, insufficient cause even if the attorney-client privilege pertinent to Leopold's disclosures did not arise until Rubin consulted Longest concerning Warner's death.

The argument principally concerns the LadySmith revolver, the .38 ammunition with which it was found loaded, and the .22 ammunition, identified by Leopold. The objects seized were introduced into evidence through the police officer who executed the search warrant.

Rubin's argument assumes that the privilege, founded in the Maryland law of evidence, would be enforced by a Maryland law based exclusionary rule that would prevent the State from introducing into evidence objects obtained under a search warrant, the legal sufficiency of which depended on information obtained from a person who violated the privilege in giving the information. The argument further assumes that the information would be excluded even if the police did nothing to encourage the violation of the privilege. We need not decide these questions.

Even if we accept Rubin's argument, it is clear that the physical items seized at the attorneys' offices under the search warrant would inevitably have been recovered by the police. A rule of Maryland law that suppressed the fruits of a search based on privileged information would not have prevented the ultimate receipt by the State and offering into evidence of the items held by the attorneys. As explained in Part II.B, *supra*, the attorneys had an ethical obligation under Maryland law, entirely independent of the search warrant, to deliver the physical items to the police at a time, which need not now be specified, in advance of trial. *See Commonwealth v. Stenhach*, 356 Pa.Super. at 23-24, 514 A.2d at 123 (denying attorney's contention that duty to deliver evidence to prosecution does not arise until court orders attorneys to do so).

Rubin also contends that, even if the application for the warrant to search Longest's office is left unexcised, it nevertheless lacks probable cause, so that the fruits of the search must be suppressed. This argument relies on the exclusionary rule that enforces the fourth amendment to the United States Constitution. As a matter of law, Rubin had no reasonable expectation of privacy in the items seized from Longest's office, because of counsel's ethical duty to deliver the evidence to the police.

IV

Maryland Code (1974, 1989 Repl.Vol.), § 9-109 of the Courts and Judicial Proceedings Article creates a privilege for communications between a patient and psychiatrist or psychologist. Under that section

> "'[p]atient' means a person who communicates or receives services regarding the diagnosis or treatment of his mental or emotional disorder from a psychiatrist, licensed psychologist, or any other person participating directly or vitally with either in rendering those services in consultation with or under direct supervision of a psychiatrist or psychologist."

§ 9-109(a)(3). A patient "has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental or emotional disorder." § 9-109(b). Rubin argues that this privilege was infringed. We do not agree.

At trial there was very little evidence concerning what occurred at Montgomery General Hospital. Leopold did not describe for the jury what transpired there. Rubin's testimony on direct stopped short of narrating the events during that part of the night in question. On cross-examination of Rubin the State sought, over objections, to elicit by leading questions that she told the hospital personnel that she had attempted suicide by taking an overdose of drugs. Rubin denied that those were the facts. Rubin then admitted having "since learned" that the name, "Sharon Peterson," had been given as her name to the hospital personnel, but Rubin said she did not know who gave that name. The defense neither objected to the questions eliciting these answers, nor moved to strike the answers. The State then attempted to inquire about blood tests, prompting another objection. A bench conference was held, the objection was sustained, a motion for mistrial was made and denied, and the State moved on to another subject in its cross-examination.

Thus, there was no evidence at trial that Rubin personally communicated anything to anyone at the hospital. Rubin contends, however, that giving a false name is privileged under § 9-109. Assuming, arguendo, that § 9- 109 is properly so construed, and assuming further that the false name was given by someone, with Rubin's authority, for the purpose of diagnosis or treatment, any error in the admission of the evidence concerning the false name was not preserved by objection.

The motion for mistrial went to the entire line of examination, and the court did not abuse its discretion in denying that motion.[5]

V

Citing *Hunter v. State*, 82 Md.App. 679, 573 A.2d 85 (1990), Rubin next submits that the circuit court erred by failing to instruct the jury, as requested, that consulting an attorney is not evidence of consciousness of guilt. The request for an instruction was inspired by some of the prosecutor's comments at the conference on prayers, but the prosecutor never made those comments in argument to the jury.

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[5] In footnotes 7 and 9 to her brief as appellant, Rubin argues that the information concerning Montgomery General Hospital should have been excised from the search warrant application before determining probable cause. The inevitable recovery analysis applied in Part III of this opinion, *supra*, applies with equal force to this contention.

At the conference on jury instructions, the court initially proposed to give a flight instruction. One of Rubin's attorneys pointed out that the instruction could not refer to Rubin's having consulted counsel. The court then considered additionally telling the jury that telephoning one's lawyer does not constitute flight. That proposal struck the prosecutor as unfair. He commented that Rubin did not call an ambulance, she called her lawyer. After further discussion the court concluded that it would not instruct on flight and that the parties could argue from the facts. The court also cautioned the prosecutor to stay away from an argument based on Rubin's consulting counsel, because that was "a delicate area."

The instructions actually given by the circuit court did not refer to flight, or to any particular act or omission as evidence of a consciousness of guilt. Defense counsel noted the following exception.

> "The other thing that we would ask for is that since it appears that the State is going to argue in this case that the defendant went up and called her detective/lawyer, they are going to argue, in effect, that the defendant should be inferred to be guilty from that fact.
>
> "Calling a lawyer is an essential right that a person has in this society and we would ask Your Honor to instruct the jury that the mere fact that a person called their lawyer, or a person working for their lawyer, is not evidence of the defendant's guilt and should not be considered as flight."[6]

The court would not supplement the instructions, commenting: "Well, I will let you argue your case and not me."

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[6] The State in its brief as appellee argues that this requested instruction is not a correct statement of the law. We need not decide that issue, and we intimate no opinion on it.

In accordance with the judge's admonition, and contrary to the expectations of defense counsel on which the exception was predicated, the prosecutor did not argue that consulting one's attorney is evidence of a consciousness of guilt.

In arguing to the jury the prosecutor referred twice to Rubin's attorneys on the night of the murder. We set forth the full context of those references in the note below.[7] In context,

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[7] In his closing argument the prosecutor said:

> "She runs up to the clinic and she has got to tell them something. She doesn't know what she told them. Well, she doesn't tell them, 'Call the police. Call an ambulance.' She says--and your memory is better than mine--but, 'Tim needs more time. He is not ready. He needs another hour. Maybe we will be back.'
>
> "If that is not a lie--because we know he is lying dead or dying on the path--and why is she doing--she is trying to explain his absence and create an opportunity for her to leave and she does. She doesn't go from there to the police. She calls a private investigator, a Mr. Miller, and meets with him and talks with him and this is a person who is a close personal friend. They go out to dinner.
>
> "She ends up spending that night with him and she meets with him and brings him back to the scene and then after the lawyers get involved she goes to the hospital and checked in under a fake name, Sharon Peterson, and then spends the night at Mr. Miller's house.
>
> "Only after the police get a warrant and they put the case together and she is notified of that warrant, then she turns herself in at the police station. Does she flee from this scene? You bet. Does she lie? You bet. Does she show consciousness of guilt? In other words, 'I am an innocent man. Let's go to the police. I will explain to you what happened.' Never. Never."

In his rebuttal the prosecutor's argument was consistent with the circuit court's analysis in partially denying the suppression motion. He said:

> "So, you know, she has already been seen there [at the clinic]. It is her gun [i.e., the Beretta]. She had no

(continued...)

the argument is entirely appropriate and does not bear the connotation which Rubin seeks to place upon it.

Consequently, there was no reversible error in denying the requested instruction. A court, when properly requested to do so, is obliged to instruct on the legal issues generated by the evidence. *Johnson v. State*, 303 Md. 487, 495 A.2d 1 (1985), *cert. denied*, 474 U.S. 1093, 106 S.Ct. 868, 88 L.Ed.2d 907 (1986). Here, the requested instruction seems to be an effort to have the court comment on, and perhaps neutralize, an anticipated argument by the State. But, even if the instruction were required when requested, the error is harmless beyond a reasonable doubt because the prosecutor never made the argument to which the instruction would have been directed.

VI

During the State's argument in rebuttal to the defense summation, the prosecutor stated, with no evidentiary basis whatsoever, that Rubin had attempted to poison Glisson. There was no objection by the defense. Rubin now argues that this clearly improper argument deprived her of her due process rights to a fair trial and to be advised of the charges against her, and that the deprivation should be recognized as plain error.

In the State's summation in chief the prosecutor argued that, in order to explain why Warner supposedly had a handgun

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[7](...continued)
option but to stick it under there [Warner's corpse] and then run--she says for her lawyers--but run to her private investigator, a personal friend, and try to figure it out and lied to the people up there, lied to them as to what happened."
(We have modified the punctuation in the immediately preceding quotation from that appearing in the transcript prepared by the typist working from the audiotape used in the court reporting system in the Circuit Court for Montgomery County).

when he was killed, Rubin lied about Warner's having admitted that he poisoned Glisson. In the course of that analysis the State suggested that, although the defense trial tactic was to leave the Glisson matter as a "cloud out there," the State had brought out in cross-examining Rubin the details which, the prosecutor submitted, should lead the jury to reject Rubin's testimony. During defense closing argument, counsel responded to the State's accusation that the defense did not want to talk about Glisson. Counsel asked the jury to recall that Glisson had first been injected into the case by defense cross-examination of Servin, but that the State had raised an objection which the court had sustained. The defense submitted that it had tried to bring to the jury all of the facts about Glisson.

In rebuttal the State acknowledged that it had objected because it did not "want to try the Glisson affair, as it is aptly named." But, the State argued that, inasmuch as it had been brought into the case, the Glisson affair shed light on how Rubin's mind worked. The prosecutor drew a parallel between the Glisson affair and the matter before the jury. He submitted that Rubin had been rejected in both instances, that she then resorted to law--as to Glisson, by suing him for damages and, as to Warner, by seeking to have him arrested for attempted murder. In drawing the next step in the parallel, the prosecutor said that Rubin had poisoned Glisson and had murdered Warner.[8]

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[8] The transcript of the subject portion of the argument reads as follows:

> "It is really illuminating the way her mind works and how is that? She has an affair with a man [Glisson]. She testified on the stand, 'I love this man.' It breaks up very badly. There is at least the allegation of physical, you know, fight between the two of them and what is her first reaction? To go to Court to get the law involved.
>
> "So, she goes to Court and she sues him alleging nerve

(continued...)

There was no basis in the evidence, or in any legitimate inference from the evidence, for the prosecutor's statement that Rubin tried to kill Glisson. The argument went well beyond the "oratorical conceit or flourish" which this Court permits. *Wilhelm v. State*, 272 Md. 404, 413, 326 A.2d 707, 714 (1974).

The issue was not preserved for appellate review by objection to the argument. "However, as [former] Rule 756 g makes clear with respect to jury instructions, and as the cases hold with respect to errors of law generally, an appellate court may in its discretion in an exceptional case take cognizance of plain error even though the matter was not raised in the trial court." *Dempsey v. State*, 277 Md. 134, 141-42, 355 A.2d 455, 459 (1976). *See also State v. Daughton*, 321 Md. 206, 210-11,

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[8](...continued)
damage to her hand. I mean, that is what she said. As I said, you can't prove that. You can't disprove it. It is up to the jury to decide, just like you all.

"Then, when that doesn't seem to be working out well, in the middle of the trial the very man with whom she seemed to break up with gets poisoned. So, when that doesn't work, she takes it in her own hand and tries to kill him and why? 'Because this man had the audacity to walk out on me,' William Glisson.

"Does that matter? No, except to the extent it lets you see how the mind works, because what happened here? Timothy Warner wanted out, too. Evidently he didn't learn from the first event and what is the first thing she does? She turns to the Court.

"She goes to the police and says, 'He [Warner] confessed to me ... recently about a crime that occurred a year and a half ago and I want you to lock him up,' and the police don't do anything about it. The Court system didn't work. Bringing the lawyer in to meet with the detective didn't work.

"So, what does she do then? She takes it in her own hand and this time she is much more direct. She takes this Smith & Wesson, a LadySmith revolver, and sets him up and kills him."

582 A.2d 521, 523 (1990) ("[A]n appellate court may recognize *sua sponte* plain error, that is, error which vitally affects a defendant's right to a fair and impartial trial.").

Trimble v. State, 300 Md. 387, 478 A.2d 1143 (1984), reiterated the circumstances justifying the exercise of plain error discretion as follows:

> "We said in *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035, 1038 (1980), that 'we have characterized instances when an appellate court should take cognizance of unobjected to error as compelling, extraordinary, exceptional or fundamental to assure the defendant of fair trial.' We further made clear that we would intervene in those circumstances only when the error complained of was so material to the rights of the accused as to amount to the kind of prejudice which precluded an impartial trial."

300 Md. at 397, 478 at 1148. *See also Calhoun v. State*, 297 Md. 563, 594, 468 A.2d 45, 59 (1983); *Hall v. State*, 292 Md. 683, 690-91, 441 A.2d 708, 712 (1982).

We have not "set forth any fixed formula for determining when discretion should be exercised." *State v. Hutchinson*, 287 Md. at 202, 411 A.2d at 1038. But, "we do expect that the appellate court would review the materiality of the error in the context in which it arose, giving due regard to whether the error was purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* at 202-03, 411 A.2d at 1038. The enumerated factors "are ordinarily inconsistent with circumstances justifying an appellate court's intervention" under plain error. *Id.* at 203, 411 A.2d at 1038.

The unobjected-to, improper argument in the case before us does not rise to the level of the deprivation of a fair trial. This is a less stringent standard than the *Dorsey* standard of harmless beyond a reasonable doubt which we applied to the preserved objection discussed in Part II.C. *A fortiori*, the improper argument is not a basis for reversal in view of the overwhelming proof of guilt. Further, given the fact that Rubin was represented by three highly qualified and experienced criminal defense counsel, we cannot say on this record that tactical reasons did not dictate a decision not to object to the argument.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.

McAULIFFE, Judge, concurring.

I disagree with the Court's holding in Part II B that it was error to admit evidence of the presence of .22-caliber bullets in Rubin's purse shortly after the shooting. If we assume Leopold's observations of the contents of the Rubin's purse were subject to the protection of the attorney-client privilege, they are also subject to the concomitant ethical obligations of disclosure by virtue of the change in condition of the evidence.

After an excellent discussion of the perplexing problems created by an attorney's receipt of tangible evidence from a client, and after seemingly accepting the principles set forth in *People v. Meredith*, 29 Cal.3d 682, 175 Cal.Rptr. 612, 631 P.2d 46 (1989), the Court concludes that the attorney may with impunity destroy significant evidentiary value flowing from the relative location of those objects one to the other by altering their position before surrendering them. I disagree.

The principal significance of the .22-caliber bullets is that they were located in Rubin's purse when that purse was given by the client to the attorney or to the attorney's investigative agents. Assuming, as a majority of the cases seem to hold, that the privilege would have prevented Longest from telling the State he had gotten the purse from Rubin, the privilege would not have protected the disclosure of other relevant information. Longest would have been required to inform the State, at the time he surrendered the tangible property, of the *condition* it was in when received, i.e., that the baggie containing six .22-caliber bullets was within the purse.

> [W]henever defense counsel removes or alters evidence, the statutory privilege does not bar revelation of the original location or condition of the evidence in question. We thus view the defense decision to remove evidence as a tactical choice. If defense counsel leaves the evidence where he discovers it, his observations derived from privileged communications are insulated from revelation. If, however, counsel chooses to remove evidence to examine or test it, the original location and *condition* of that evidence loses the protection of the privilege.

People v. Meredith, supra, 175 Cal.Rptr. at 620, 631 P.2d at 54 (footnote omitted; emphasis added).

Longest would also have been required to disclose the location where he or his agents took possession of the purse, and the date and time of that possession. The State would then have been permitted to place before the jury the tangible objects, together with information that on a particular date and at a particular time and location the purse was present and the bullets were within the purse.[1] The State would have been required to tie the purse to Rubin, but if this could have not been done by the contents of the purse, Leopold could have testified concerning non-privileged observations he made of Rubin and the purse before Longest arrived on the scene.

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[1] Precisely how such information is presented to a jury is, of course, a problem calling for careful consideration by the trial judge. The "location," for example, might best be described as the area of Olney, rather than by the name of the hospital. The preferred solution for the presentation of such evidence is probably a stipulation, to the form of which the defendant's trial counsel could agree while still preserving an objection as to privilege. Alternatively, the trial judge might approve a statement of evidence which the prosecutor could read to the jury, perhaps accompanied by instructions from the court that the statement is to be received by the jury as evidence. I have not endeavored to exhaust the possible options--the (continued...)

There is a fine and delicate balance to be struck here between two very important principles: the attorney-client privilege on the one hand, and the high ethical obligation of an attorney on the other hand. Neither the client nor the attorney should be permitted to hide or alter evidence of criminal activity by the simple expedient of delivering it to the attorney. If the Court is correct in the instant case, however, an attorney may successfully destroy the evidentiary value of the .22-caliber bullets by separating them from the purse in which he received them. I think it entirely reasonable, in an attempt to fairly accommodate both principles, to permit the introduction of evidence that the attorney is required to promptly disclose to the State. For this purpose, we should consider to have been done that which should have been done.

CHASANOW, J., joins in this opinion.

ROBERT M. BELL, Judge, dissenting.

In part II. B., after a painstaking and flawless analysis, involving the review and discussion of numerous cases which have touched on the issue, the majority concludes, quite properly so, that the observation, by the private detective, of .22 caliber bullets in the petitioner's purse was made while a part of the defense team and, consequently, resulted from privileged communications. It holds, therefore, that the court erred when it permitted the private detective to testify

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[1] (...continued)
goal is simply to place before the jury, in some form in which the jury understands the information to be evidence, the factual information that is not privileged.

concerning his observations. The majority goes on, in part II. C., this time, unfortunately, without the same painstaking and flawless analysis, to hold that the error was harmless beyond a reasonable doubt. I agree that the trial court erred. I do not agree that the error was harmless.

In finding the error to be harmless, the majority's analysis is that, excluding the erroneously admitted evidence, that which remains is so overwhelming that no rational jury could have reached a different verdict. In support, it sets out 15 propositions, which it characterizes as "'unchallenged' physical and forensic-opinion evidence," from which, it maintains, the petitioner would have been required to generate a reasonable doubt that she acted in self-defense. It concludes that a reasonable doubt could not have been generated from that evidence.

In addition to first degree murder, the court, at petitioner's request, instructed the jury on second degree murder. Consequently, in addition to the question of the effect of the error on the issue of the petitioner's guilt or innocence, there is the additional one of whether it influenced the jury determination of the extent of the petitioner's culpability, *i.e.* did it influence the first degree murder determination? I am satisfied that the error influenced both the issue of guilt and the issue of how culpable the petitioner was.

I.

Following a thorough review of our cases and those of the Supreme Court which addressed the issue, this Court, in *Dorsey v. State*, 276 Md. 638, 350 A.2d 665 (1976), enunciated the test of harmless error which controls the resolution of this case:

> ... When an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable

> doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of--whether erroneously admitted or excluded--may have contributed to the rendition of the guilty verdict. (footnote omitted)

Id. at 659, 350 A.2d at 678. The test focuses on the effect of erroneously admitted, or excluded, evidence on the verdict rendered by the jury. Once it has been determined that error was committed, reversal is required unless the error did not influence the verdict; the error is harmless only if it did not play any role in the jury's verdict. The reviewing court must exclude that possibility, "beyond a reasonable doubt."

We also made clear that the test of harmless error is supposed to be strict; indeed, it "has been and should be carefully circumscribed." *Younie v. State*, 272 Md. 233, 248, 322 A.2d 211, 219 (1974). In that case, quoting *People v. Jablonski*, 38 Mich.App. 33, 195 N.W.2d 777, 780 (1972), we pointed out:

> "Continued expansion of the harmless error rule will merely encourage prosecutors to get such testimony in, since they know that, they have a strong case, such testimony will not be considered to be reversible error, yet if they have a weak case, they will use such testimony to buttress the case to gain a conviction and then hope that the issue is not raised on appeal."

272 Md. at 248, 322 A.2d at 219.

Where the evidence remaining after excluding erroneously admitted evidence is insufficient to sustain the conviction, the error can never be harmless. Similarly, if the questioned evidence goes to an important issue in the case, especially if credibility is central to the resolution of the case, the error in admitting that evidence is likewise not harmless.

This is the case because it is the trier of fact, in this case, the jury, not an appellate court, that must find the facts and resolve credibility issues. Therefore, what appears, on the cold record, to be an insurmountable case for the State, when viewed from the jury's perspective, having seen it unfold through live witnesses, in the dramatic atmosphere of the courtroom, may be quite a close case or result in a defense verdict. How, or why, a jury may decide to resolve credibility or fact issues in a particular manner is a matter only it knows. One thing is certain, the jury is under no obligation to decide any case consistently with what is, objectively, the strongest case.

Thus, although relevant, as a threshold matter, to the harmless error inquiry, we are not here concerned with whether the evidence, exclusive of the detective's observations, is sufficient to sustain the jury's verdict. It undoubtedly is. Nor need we decide whether a rational jury, presented with evidence, appropriately shorn of the detective's testimony regarding the contents of the petitioner's purse, was required, as a matter of law, to find her guilty. It clearly was not. We are concerned, rather, with whether the jury that considered the evidence that was, in fact, admitted, was, or could have been, influenced, in rendering its verdict, by evidence that should not have been admitted.

The relevance of the private detective's testimony that he saw .22 caliber bullets in the petitioner's purse is its tendency to prove that, on the day of the victim's murder, the petitioner possessed the Beretta, the gun found under the victim's body. It could be inferred from that testimony that the petitioner brought the Beretta to the murder scene, having lured her husband there, and, after shooting and killing him, planted it under his body, thus, creating the predicate for the self-defense story she would later tell. With that testimony as the foundation, the jury could have concluded, as it undoubtedly did, that the petitioner's self-defense testimony was just so much bunk and, consequently, that she had carefully planned, and executed, the murder. When told of having seen, in the petitioner's purse, .22 caliber bullets fitting the Beretta, the petitioner's self-defense testimony notwithstanding, it is difficult to imagine how the jury could have reached any verdict other than "guilty of murder in the first degree." The fact that there were .22 caliber bullets in the petitioner's purse a short time after the petitioner claimed she shot the victim in self-defense had to play a role, if not a significant one, in the jury's deliberations; it *certainly* tended to negate the self-defense theory. Application of the *Dorsey* test leads inexorably, in my opinion, to the conclusion that admission of the complained of evidence was by no means harmless. To the contrary, it was exceedingly harmful; it could not help but be.

Upon its independent review of the record, the majority declares its belief, beyond a reasonable doubt, that absent the detective's observations, the jury's verdict would have been the same. Although it cites *Dorsey*, the majority does not apply the harmless error test as there enunciated. Instead, it applies the test as explained in *Ross v. State*, 276 Md. 664, 674, 350 A.2d 680, 686-7 (1976):

> The essence of this test is the determination whether the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded.

Thus, excising the evidence admitted in error, and focusing on what remains, it concludes that a reasonable doubt simply could not have been generated from that evidence. Under that formulation, the test for harmless error is: whether, excluding the offending evidence, that which remains is sufficient to sustain the conviction and/or is, in fact, such that the case for conviction is "overwhelming." It requires, in addition to the threshold determination of sufficiency, that an appellate court weigh the evidence. So, the majority reasons, where the evidence is sufficient to convict and it is also strong enough to meet its definition of "overwhelming", only one verdict, guilty, is possible, as a matter of law; hence, that evidence cannot generate a reasonable doubt.

Although the *Ross* formulation of the test has been stated in subsequent cases, *see Trusty v. State*, 308 Md. 658, 668-69, 521 A.2d 749, 754 (1987), and even applied, *see Mills v. State*, 310 Md. 33, 48-49, 527 A.2d 3, 10 (1987) (dicta), I have found no case which has provided a reasoned justification for it. It is significant, I think, that the error in *Ross* was held not to be harmless and that a factor influencing that holding was that the case was tried by a jury. 276 Md. at 674, 350 A.2d at 686-7. *See also State v. Fuller*, 308 Md. 547, 554, 520 A.2d 1315, 1318 (1987) (where trier of fact considered erroneously submitted evidence, case remanded to determine if, without that evidence trier of fact would reach same conclusion). In any event, that approach, in my opinion, is contrary to the role of an appellate court.

No matter how strong a case for conviction the State may present, even when the defense presents no evidence, the court may not direct a verdict for the State. *See* Maryland Rule 4-324, which, while providing that a defendant may move for judgment of acquittal, Rule 4-324(a),[1] and the court may direct

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[1] Maryland Rule 4-324(a) provides:

(a) Generally.--A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the

(continued...)

the entry of judgment in his or her favor if there is insufficient evidence, as a matter of law, Rule 4-324(b), makes no provision for the making of a motion for judgment by the State. Compare Maryland Rule 2- 519,[2] the civil counterpart. *Lyles v. State*, 308 Md. 129, 135, 517 A.2d 761, 764 (1986). This is so because it is the trier of fact, whether the court or a jury, that must determine if the State has met its burden of proof. To make that determination, the trier of fact is required to find the facts and when, as is usually the case, there are credibility issues, to resolve them. That, in turn, involves weighing the evidence. Appellate courts do not find facts or weigh evidence, "what evidence to believe, what weight to be given it, and what facts flow from that evidence are for the jury ... to determine." *Dykes v. State*, 319 Md. 206, 224, 571 A.2d 1251, 1260-1 (1990). *See Gore v. State*, 309 Md. 203, 214, 522 A.2d 1338, (1987); *Wilson v. State*, 261 Md. 551, 566, 276 A.2d 214, 221 (1971); *Jacobs v. State*, 238 Md. 648, 650, 210 A.2d 722, 723-4 (1965). Even when an appellate court assesses the sufficiency of the evidence, it does not weigh it, *see Clemson v. Butler Aviation-Friendship*, 266 Md. 666, 671, 296 A.2d 419, 422 (1972); *Gray v. Director*, 245 Md. 80, 84, 224 A.2d 879, 881 (1965), it only determines if any evidence exists, on the basis of which a rational trier of fact could find the elements

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[1](...continued)
State's case.

[2] Maryland Rule 2-519(a) provides:
(a) Generally.--A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560, 573 (1979); *Bloodsworth v. State*, 307 Md. 164, 167, 512 A.2d 1056, 1057 (1986). There is no reason that a harmless error analysis should permit it to do more.

By basing its harmless error determination, in part, on the inability of the petitioner to generate a reasonable doubt from the evidence available for its consideration, the majority necessarily has determined the weight to be given the evidence. When it weighs evidence, an appellate court usurps the function of the jury. Moreover, despite its characterization to the contrary, the majority is actually construing the *Dorsey* test as permitting harmless error to be determined on an "otherwise sufficient" basis: if the evidence is sufficient without the improper evidence, *i.e.*, the jury could have convicted the defendant without it, harm could not have resulted. In any event, whether intended or not, there is a real danger that it will be so construed in future cases. This is nothing more than unwarranted expansion of the harmless error rule, which should not be condoned.

II.

Even if the test applied by the majority were the proper one, reversal is still required.

The petitioner testified that she purchased both a .38 caliber "LadySmith" revolver and the Beretta for protection from the victim, whom she feared. She registered both guns, intending to carry one, the Beretta, on her person whenever she met with her husband, and to keep the other at home in her bedside table. The petitioner purchased ammunition for both guns.

On the day of the murder, the petitioner testified that when her husband arrived with their dog, he wanted to take him for a walk. That is why they went into the woods. Subsequently, she told her husband that she had told the police of his admission to her that he had attempted to kill her former boyfriend. At that, she said, the victim became enraged screaming, "You are never going to get a chance to tell the F.B.I. anything else." He then pulled the Beretta from his pocket and pointed it at her. Moving more quickly, her hand being already in her open purse, poised to turn on the tape recorder, the petitioner maintained that she pulled the LadySmith revolver she had on her person and shot the victim. Concerning the reason she had the LadySmith revolver, rather than the Beretta, she asserted that she noticed the Beretta was missing as she was leaving to meet the victim and, so, she picked up the LadySmith. She assumed that the victim took it; he had a key to her home. She also testified that she continued to shoot him because the victim kept coming toward her. She explained that she shot him while he was lying, face down, on the ground because he was still moving and making sounds and she knew that he still had the Beretta.

The majority may well be correct, even without the evidence of the .22 caliber bullets in the petitioner's purse, the case against the petitioner is very strong, maybe even overwhelming, in favor of the State. It is not so overwhelming, however, as to require, as a matter of law, a verdict for the State; a trier of fact, in this case, the jury, is not compelled to find the petitioner guilty. That the petitioner's case suffers badly in comparison to the State's and may only be characterized as "weak" does not mean that the petitioner automatically loses. When, as in this case, credibility is involved, a jury is never required to accept, as true, the allegations of the party, which, on an objective basis, presents the strongest case; it may choose to accept the position advocated by the opponent. It is the jury which, having seen and heard the witnesses and resolved conflicts in the testimony, must assess, *i.e.*, weigh, the evidence. To adopt the majority's position as noted earlier, is to, place the responsibility for weighing evidence on the appellate court.

The petitioner's testimony that the victim may have taken the Beretta from her home and brought it with him to the rendezvous is neither improbable nor impossible. That he did not do so may be more plausible, but that is not dispositive. Moreover, the fact that the victim wore only slacks and a shirt does not render the petitioner's testimony that he carried the gun on him inherently unbelievable. Critical to this issue is information bearing on how tapered the victim's slacks and shirt were, for it, along with evidence as to the size of the Beretta, will determine the plausibility of the petitioner's testimony on this point. The petitioner has apparently maintained for some time that the victim tried to murder her former boyfriend. From that proposition, it is but a small leap to the propositions which flow from it. Thus, neither the testimony that the victim admitted the attempted murder to her, nor the testimony that the victim flew into a rage when told she had discussed that fact with the police is unreasonable or wholly devoid of credibility. And it is reasonable, hence, by no means unbelievable, that one who is engaged in a rather tense encounter with an enraged person, who, incidentally, has also pulled a gun on her could forget to turn on a tape recorder. To be sure, the majority's point that a person does not usually go for a gun while holding a large dog with his gun hand is a strong one; however, just how strong is a matter best left for the jury, and not this Court, to decide. If that proposition were true, it would make more plausible one that now seems hopelessly implausible *i.e.*, having produced the gun while holding a large dog renders it somewhat understandable that he did not operate it either very efficiently or quickly, which, in turn, may explain why the petitioner had the opportunity to retrieve, and fire, her own gun.[3] Whatever my, or the majority's conclusions, on the point, it is possible that the jury could have been convinced that panic is the explanation for why the petitioner reacted as she did once she shot the victim.

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[3] The majority's editorial comments as to what was in the petitioner's purse depend, I suspect, on the evidence that should have been excluded and, hence, may not be considered.

III.

The jury found the petitioner guilty of premeditated first degree murder, as opposed to second degree non-premeditated murder. Even if the erroneously admitted evidence did not influence the jury's verdict on the issue of the petitioner's guilt or innocence, I believe that it must have influenced the jury's decision on the degree of her culpability.

> Murder is the killing of one human being by another with the requisite malevolent state of mind and without justification, excuse, or mitigation. These qualifying malevolent states of mind are: 1) the intent to kill, 2) the intent to do grievous bodily harm, 3) the intent to an act under circumstances manifesting extreme indifference to the value of human life (depraved heart), or 4) the intent to commit a dangerous felony. (footnote and citation omitted)

Ross v. State, 308 Md. 337, 340, 519 A.2d 735, 736 (1987).

Maryland Code (1957, 1992 Repl.Vol.) Art. 27 § 407 defines murder in the first degree as "[a]ll murder which shall be perpetrated ... by any kind of willful, deliberate and premeditated killing...." *See Wooten-Bey v. State*, 308 Md. 534, 537, 520 A.2d 1090, 1091 (1987); *Ross v. State*, 308 Md. at 337, 341, 519 A.2d 735, 737; *Newton v. State*, 280 Md. 260, 268, 373 A.2d 262, 266 (1977). All murder not designated as murder in the first degree is deemed to be murder in the second degree. Maryland Code, Art. 27 § 411. Thus, murder that is not premeditated, deliberate and wilful, or that is not committed in the perpetration of the felonies enumerated in §§ 408-410, is murder in the second degree. The burden is on the State to prove, beyond a reasonable doubt, the degree of the murder committed by a defendant. *Hook v. State*, 315 Md. 25, 28 n. 5, 553 A.2d 233, 235 n. 5 (1989), *Wilson v. State*, 261 Md. 551, 563, 276 A.2d 214, 221 (1971), *DeVaughn v. State*, 232 Md. 447, 456, 194 A.2d 109, 114 (1963), *cert. denied*, 376 U.S. 927, 84 S.Ct. 693, 11 L.Ed.2d 623 (1964), *Elliott v. State*, 215 Md. 152, 160, 137 A.2d 130, 134 (1957), and *Chisley v. State*, 202 Md. 87, 105, 95 A.2d 577, 585 (1953).

In the case *sub judice*, the critical issue was, did the petitioner act deliberately and with premeditation? The evidence supporting that intent was, of course, the private investigator's observations. Because it placed bullets for the Beretta in her purse, the jury was enabled to infer that the petitioner murdered the victim premeditatedly, and with deliberation. With that evidence out of the case, the jury could have accepted the petitioner's testimony on the critical issue and concluded that she did not plan the murder. Again, the critical inquiry is not whether the evidence is sufficient to support the verdict rendered or the weight that evidence should be given; all we need do here is to determine whether, if faced with two choices, there was a sufficient factual predicate to have enabled the jury to find either. On this issue, notwithstanding that they are not, objectively, equally plausible, I think that there was.

IV.

In my opinion, the petitioner was prejudiced by the admission of the private detective's observation of the bullets in her purse. I would, accordingly, order the new trial to which she is entitled.